

***United States Court of Appeals
for the Second Circuit***



APPENDIX

77-2073
77-2078

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

IOLA FORTS, PAULA HERBERT, CYNTHIA HALL, LAURA CAREY, LINDA MAROON,
CAROL CROOKS, SHARON SILMAN, YVONNE LEE, SHEILA LILES, DEBORAH
LEWIS, On Behalf of Themselves and all Others Similarly Situated,

Plaintiffs-Appellees,

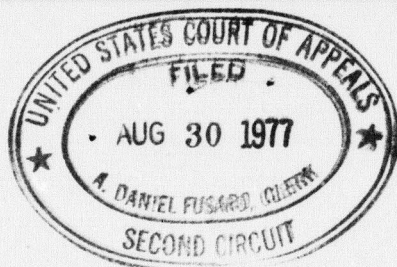
-against-

BENJAMIN WARD, individually and as Commissioner of Correctional
Services, FRANCES CLEMENT, individually, and as Superintendent,
Bedford Hills Correctional Facility, DOROTHY REID, individually
and as Deputy Superintendent for Security, Bedford Hills Correc-
tional Facility, MELVIN H. OSTERMAN, JR., Director of Employee
Relations for the State of New York, SECURITY UNIT EMPLOYEES
COUNCIL 82, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL
EMPLOYEES, AFL-CIO ("Council 82"), CARL F. GRAY, Executive
Director, Council 82, CLAYTON DeFAYETTE, President, Council 82,
Local 1265 of Council 82, A.V. YARELL, President, Local 1265,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JOINT APPENDIX FOR THE
DEFENDANTS-APPELLANTS



LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendants-
Appellants Ward, Clement &
Reid
Two World Trade Center
New York, New York 10047
Tel. No. (212) 488-3014

PAGINATION AS IN ORIGINAL COPY

TABLE OF CONTENTS

	<u>Page</u>
Relevant Docket Entries.....	1a
Summons.....	2a
Complaint.....	3a
Notice of Motion.....	14a
Affidavit of Bernidienne Watkins.....	16a
Affidavit of Carol Crooks.....	18a
Affidavit of Yvonne Lee.....	21a
Affidavit of Linda Marron.....	23a
Memorandum in Support of Motion for Preliminary Injunction and to Determine the Class.....	25a
Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for a Preliminary Injunction and Class Certification.....	54a
Affidavit of Carl F. Gray in Opposition to Motion for Preliminary Injunction.....	66a
Memorandum of Law in Opposition to Motion for Preliminary Injunction Submitted by Defendants Security Unit Employees Council 82, DeFayette, Local 1265, and Yarell.....	109a

	<u>Page</u>
Memorandum Decision of the District Court.	114a
Order of the District Court.	123a
Notice of Appeal by Defendants Ward, Clement and Reid.	126a
Notice of Appeal by Defendants Security Unit Employees Council 82, Gray, DeFayette, Local 1265 and Yarell.	127a

1a PROCEEDINGS

- 7 1 Filed complaint and issued summons.
- 7 2 Filed order permitting plff to proceed in forma pauperis. HETZNER J
- 77 3. Filed summons with Marshals return served the following:
Benjamin Ward, by Marshal Nadan, on 4-11-77.
Security Employees Unit Council 82 by Hollis V. Chase, on 4-19-77.
A.V. Yarell B.H.C.F. by Dorothy Reid, on 4-15-77.
Local 1265 of Council 82, by Dorothy Reid, on 4-15-77.
Dorothy Reid Bedford Hills Correctional Facility by Dorothy Reid,
on 4-15-77.
Frances Clement, Superintendent Bedford Hills Correctional Facility
by Dorothy Reid, on 4-15-77.
- 7 4. Filed plffs' memorandum in support of motion for preliminary injunction & to deter-
mine the class.
- 77 5 Filed Pltffs. Notice of Motion for order of preliminaryily enjoining
dfts.,etc. Ret. 5/19/77....
- 77 6 Filed Affdvt. of Service by Romana Bruno on 5/4/77 Served Notice of
Motion.
- 77 7 Filed stp and order ext. time of defts to answer to 6-1-77. Owen J.
- 77 8. Filed pltffs' 1st set of interrogatories.
- 77 9. Filed deft's affdvt. in opposition to motion for a preliminary (LJL)
injunction.
- 77 10 Filed Memo. of Law in support of affvt. in opposition of motion for
a preliminary injunction.
- 77 11 Filed deft. Amer. Feder. Municipal Empl. affdvt. in opposition to
motion for preliminary injunction.
- 77 12 Filed deft. Amer. Feder. Municipal Empl. Memo. of Law in opposition (R&F)
ormotion for preliminary injunction.
- 77 13 Filed affdvt. of service by mail.
- 7 14 Filed stip. & Order extending time for deft. Oswald, Clement and Reid
to answer complaint to 6-16-77.....Owne, J.
- 77 15 Filed ANSWER of deft Security Unit Employes Counseel 82, Carl Gray, A. V. Yarrell,
C. DeFayette.
- 77 16 Filed ANSWER of defts (LJL)
- 77 17 Filed memo and order..... preliminary injunction is granted. Submit Order.
Owen J. m/n
- 77 18 Filed order with notice of settlement .. plttf motion to certify class is denied
plttf motion for prliminary injuncton granted.... deft enjoined from assigning men
to Bedford Hills... Officers are enjoined from enter shower facilities.... deft
application for stay is denied. Owen J.
- 77 19 Filed notice of appeal to the USCA form order dated 6/22/77 of J. Owen granting
preliminary injunction. m/n
- 7 20 Filed notice of transmission of record on appeal to the USCA.
- 7 21 Filed notice of appeal to the USCA by defts Security Unit Employees from the
order of J. owen dated 6-22-77. m/n
- 27-77 22 Filed deft 1st sets of interrogs.
- 27-77 23 Filed deft answer to plttf 1st set of interrogs.
- 27-77 24 Filed plttf supplemental interrogs.

United States District Court

FOR THE

SOUTHERN DISTRICT OF NEW YORK

IOLA FORTS, PAULA HERBERT, CYNTHIA HALL,
LAURA CAREY, LINDA MAROON, CAROL CROOKS,
SHARON SILMAN, YVONNE LEE, SHEILA LILES,
DEBORAH LEWIS, On Behalf of Themselves and
all others Similarly Situated,

CIVIL ACTION FILE NO. 77CV 1530*Joseph D. ...*

Plaintiffs,

-against-

BENJAMIN WARD, Individually, and as Commission-
er of Correctional Services, FRANCES CLEMENT,
individually, and as Superintendent, Bedford
Hills Correctional Facility, DOROTHY REID,
individually and as Deputy Superintendent for
Security, Bedford Hills Correctional Facility,
MELVIN H. OSTERMAN, JR., Director of Employee
Relations for the State of New York, SECURITY
UNIT EMPLOYEES COUNCIL 82, AMERICAN FEDERATION
OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-
CIO ("Council 82"), CARL F. GRAY, Executive
Director, Council 82, CLAYTON De FAYETTE,
President, Council 82, Local 1265 of Council
82, A.V. YARELL, President, Local 1265,

SUMMONS

Defendants.

To the above named Defendant S:

You are hereby summoned and required to serve upon Bronx Legal Services, Corp. C
by Stephen M. Latimer.

plaintiff's attorney, whose address is: 579 Courtlandt Avenue, Bronx, New York,
10451

an answer to the complaint which is herewith served upon you, within 20 days after service of this
summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be
taken against you for the relief demanded in the complaint.

Raymond F. Buehner

Clerk of Court.

6 Wasserman

Deputy Clerk.

Date: April 1, 1977

[Seal of Court]

NOTE:—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

FEDERAL BUREAU OF INVESTIGATION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IOLA FORTS, PAULA HERBERT, CYNTHIA HALL, LAURA
CAREY, LINDA MAROON, CAROL CROOKS,
SHARON SILMAN, YVONNE LEE, SHEILA LILES,
DEBORAH LEWIS, On Behalf of Themselves and all
Others Similarly Situated,

Plaintiffs,

COMPLAINT
CLASS ACTION

-against-

BENJAMIN WARD, individually, and as
Commissioner of Correctional Services, FRANCES
CLEMENT, individually, and as Superintendent,
Bedford Hills Correctional Facility, DOROTHY
REID, individually and as Deputy Superintendent
for Security, Bedford Hills Correctional
Facility, MELVIN H. OSTERMAN, JR., Director of
Employee Relations for the State of New York,
SECURITY UNIT EMPLOYEES COUNCIL 82, AMERICAN
FEDERATION OF STATE, COUNTY AND MUNICIPAL
EMPLOYEES, AFL-CIO ("Council 82"), CARL F. GRAY,
Executive Director, Council 82, CLAYTON De
FAYETTE, President, Council 82, Local 1265 of
Council 82, A.V. YARELL, President, Local 1265,

Defendants.

JURISDICTION:

1. Plaintiffs, women inmates of Bedford Hills Correctional Facility, sue pursuant to 42 U.S.C., 1983 for redress of deprivation of their right of privacy, among other things, caused by the posting of men guards in various places in the prison including housing units, ¹ at toilet facilities and the

1. "Housing Unit" refers to those portions of buildings 111, 112, 113, 114 and the hospital which contain cells or rooms in which the prisoners live.

prison clinic where men can observe women on the medication line in such a manner as to cause the women to be unnecessarily and involuntarily exposed in the nude and partially clad to the men guards. All Plaintiffs and the Class as a whole claim that such involuntary exposure violates their Eighth, Ninth and Fourteenth Amendment rights.

2. All Defendants are acting under color of State law and have violated the civil and constitutional rights of Plaintiffs and the Class thus making appropriate relief under 42 U.S.C. 1983. Jurisdiction is invoked pursuant to 28 U.S.C. 1343 (3) and declaratory relief is sought pursuant to 28 U.S.C. 2201, et. seq. The Court has jurisdiction of any state law claims under the doctrine of pendent jurisdiction.

CLASS ACTION ALLEGATIONS

3. Plaintiffs seek to maintain the action as a Class Action pursuant to F.R.C.P. 23 (a) and (b) (2) on behalf of all women incarcerated in Bedford Hills Correctional Facility ("Bedford Hills") and a sub-class consisting of all Muslim women inmates at Bedford Hills. There are approximately four hundred women inmates at Bedford Hills. Each inmate lives on a housing unit in which men guards are or may be assigned as a part of their normal duties, and utilizes other facilities at the prison where men guards are routinely

assigned. Each woman is thus subject to the same deprivations of privacy humiliation and embarrassment as the named Plaintiffs. Of the four hundred women, approximately one hundred are followers of the Muslim faith. The Class is therefore so numerous as to make joinder impracticable.

4. The indignities and humiliation caused by the forced exposure of the women's nude bodies and excretory and feminine hygienic functions to the view of the men guards are common to all members of the Class. Whether this invasion of privacy violates the constitutional rights of the Plaintiff Class is a question common to all women inmates. In addition, the Muslim inmates claim that the practices complained of violate their First Amendment right to the free exercise of their religion. There are thus questions of law and fact common to the Class.

5. The claims of the named Plaintiffs, that men guards on housing units infringe on their constitutionally protected rights are typical of the claims of the Class. The Plaintiffs will fairly and adequately protect the interests of the Class.

6. By placing men guards in housing units, other areas where women must involuntarily expose their bodies and by refusing to remove them, the Defendants acted and refused to act on grounds generally applicable to the Class. Their retention in all housing units and the other areas where inmates' privacy

is invaded makes appropriate final injunctive relief or corresponding declaratory relief with respect to the Class as a whole.

PARTIES

A. Plaintiffs:

7. All Plaintiffs are incarcerated at Bedford Hills. Each is serving a sentence of imprisonment pursuant to a judgment of conviction of a Court of appropriate jurisdiction in New York State.

8. Carol Crooks, Iola Forts, Paula Herbert and Sheila Liles are followers of Islam.

B. Defendants:

9. Benjamin Ward is Commissioner of Correctional Services of New York State. He is responsible for the administration and operation of the Department of Correctional Services.

10. Frances Clement is Superintendent of Bedford Hills Correctional Facility. She is responsible for the administration and operation of the prison, including assignment of correction officers to jobs and shifts within the prison, specifically, she approves assignments made by Deputy Superintendent Reid.

11. Dorothy Reid is Deputy Superintendent for Security at Bedford Hills. She is responsible under Superintendent Clement for assigning correction officers to job and shift assignments, including transfer and assignment of employees of the Department.

12. Melvin H. Osterman, Jr. is the Director of Employee Relations for the State of New York. He approved the collective bargaining agreement dated March 29, 1974, between the State of New York and Security Unit Employees Council 82, American Federation of State, County and Municipal Employees, AFL-CIO, ("Council 82").

13. Council 82 is the Collective Bargaining Unit for Correction Officers in New York State, and is empowered by law to enter into collective bargaining agreements with the State of New York in behalf of its members.

14. Carl F. Gray and Clayton DeFayette, are or were the principal executive officers of Council 82. They signed the collective bargaining agreement dated March 29, 1974 between Council 82 and the State of New York ("the agreement").

15. Local 1265 of Council 82 is the collective bargaining unit for member employees at Bedford Hills.

16. A.V. Yarell is President of Local 1265. She has responsibility and authority necessary to carry out the terms of the agreement on behalf of employees at Bedford Hills.

FACTS

A. Bedford Hills.

17. Bedford Hills is the only prison in New York State that is solely for women convicted of felonies.

18. On information and belief, prior to July 23, 1976, the Correction Officer Staff at Bedford Hills, including ranks up to Captain, consisted only of women. On or after that date, under authority of Superintendent Clement, men correction officers were assigned to various jobs and shifts at the prison, including jobs and shifts in buildings 111, 112, 113 114 and the hospital.

19. On or about October 26, 1976, Commissioner Ward issued a directive which had the effect of permitting men correction officers to fill any job or shift assignment within Bedford Hills, including assignment to the women inmates' housing units and other areas where the women might, in the normal course, appear nude or partially clad. On or about February 1, 1977, Superintendent Clement began assigning correction officers to housing units at Bedford Hills.

B. Council 82 and Local 1265:

20. On or about March 29, 1974, Council 82 represented by Defendants Gray and DeFayette, among others, and the State of New York represented by Defendant Osterman, entered into an agreement for the establishment of wages, hours of work and other terms and conditions of employment for correction officers in New York State ("the agreement"). Members of Local 1265 at Bedford Hills are included within the terms of the agreement. On information and belief, that agreement or one with a substantially similar seniority article is in full force and effect.

21. Job and shift assignments within Bedford Hills are controlled by Article 25 of the agreement. Article 25, entitled "Seniority," provides in pertinent part that job assignments shall be made in accordance with seniority, and that employees may bid for permanent vacancies in shifts or job assignments. On information and belief, the bidding procedure at Bedford Hills is conducted by Local 1265.

22. Commissioner Ward's directive of October 26, 1976 permitted men correction officers to be assigned to Bedford Hills. Once there, they were and are assigned to housing units, either temporarily by Superintendent Clement, or permanently by the bidding procedure specified in Article 25 of the agreement as applied by Local 1265.

FIRST CLAIM

23. Plaintiffs incorporate by reference, the allegations of paragraphs 1 through 22.

24. Men correction officers are presently assigned to housing units and are stationed by toilets, the prison clinic and the medication line where they are able to and do observe women in the nude or partially clad without their consent. The men correction officers at Bedford Hills perform all duties previously performed by women correction officers who formerly occupied those job and shift assignments.

25. Women inmates are not permitted to have a curtain on the window of their cell door, nor are they permitted to place

a curtain on the doorway when the door is open. As a result, the women inmates are continuously exposed to the uninvited gaze of men correction officers.

26. Men correction officers enter women's housing units unannounced. They look into women's rooms and toilets unannounced and often at times when the women inmates are nude or partially clad. They have, in this manner, without the inmates' consent, observed women inmates on various occasions seated on the toilet performing excretory and feminine hygiene functions.

27. Men correction officers often are stationed by the shower rooms in the housing units. Women taking a shower are without their consent completely exposed to the view of the men while undressing, showering and dressing again.

28. On occasion men correction officers have participated in personal strip searches of women inmates.

29. On information and belief, men correction officers have made unwarranted and unwanted sexual advances to women inmates.

30. The State has no compelling interest in forcing women inmates to have their nude bodies involuntarily exposed to the gaze of male guards. That exposure has resulted in a deprivation of dignity and severe humiliation and embarrassment of Plaintiffs and members of the Class.

31. The unwarranted invasion of privacy described above violates Plaintiffs' and the Classes' rights under the First, Ninth and Fourteenth Amendments.

SECOND CLAIM

32. Plaintiffs incorporate by reference, the allegations of paragraphs 1 through 30.

33. The practices complained of constitute an unwarranted intrusion into privacy and person of Plaintiffs and the Class in violation of their Fourth Amendment rights.

THIRD CLAIM

34. Plaintiffs incorporate by reference, the allegations of paragraphs 1 through 30.

35. The placement of men correction officers in housing units at Bedford Hills subjects Plaintiffs and the Class to extreme humiliation, degradation and embarrassment. It is a measure designed to strip women prisoners of their dignity and physical and moral integrity.

36. The Defendants have no legitimate penological objective in subjecting Plaintiffs and the Class to this debasement.

37. The practices complained of violate Plaintiffs Eighth Amendment right to not have cruel and unusual punishment inflicted.

FOURTH CLAIM

38. Plaintiffs incorporate by reference, the allegations of

paragraphs 1 through 30.

39. It is a fundamental tenet of Islam that women are to dress modestly and to keep their body covered. Islam prohibits women from exposing their bodies to any man except their husbands, fathers and certain other relatives by blood and marriage.

40. The presence of men correction officers on housing units forces Muslim women to expose their bodies to men in violation of their religious beliefs.

41. The State has no compelling interest in requiring Muslim women to violate this fundamental tenet of their religion.

42. The practices complained of violate the First Amendment right of Muslim women inmates to freely exercise their religion.

WHEREFORE, Plaintiffs pray that this Court enter a judgment pursuant to 28 U.S.C., §2201, et. seq.:

1. Declaring that the Defendants have violated Plaintiffs' rights under the First, Fourth, Eighth, Ninth and Fourteenth Amendments to the United States Constitution.

2. Permitting the action to proceed as a Class Action on behalf of all women who are now or will be incarcerated at Bedford Hills with a sub-class consisting of all Muslim women so situated.

3. Preliminarily and permanently enjoining Defendants from assigning men correction officers to housing units and

other areas where women inmates may, in the normal course, be nude or partially clad at Bedford Hills.

4. Awarding each Plaintiff against Defendants Ward, Clement and Reid, damages in the amount of \$10,000.

5. Awarding Plaintiffs the costs of the action and reasonable attorneys fees.

6. Awarding Plaintiffs such other and further relief as to the Court may seem just and proper.

Yours, etc.,

EMILIO P. GAUTIER, ESQ.,
Project Director
BRONX LEGAL SERVICES, CORP. C.
579 Courtlandt Avenue
Bronx, New York 10451
Tel. 212-993-6250
STEPHEN M. LATIMER, Of Counsel
Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IOLA FORTS, ET. AL.,

Plaintiffs,

-against-

BENJAMIN WARD, ET. AL.,

Defendants.
_____:

RECEIVED
MAY 5 - 1977
DEPARTMENT OF L.A.
NEW YORK CITY

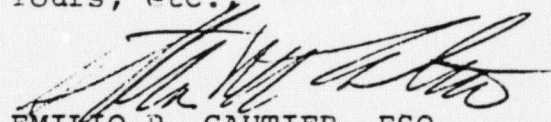
NOTICE OF MOTION

77 Civ. 1560 (R.O.)

PLEASE TAKE NOTICE, that upon the annexed affidavits of Bernedienne Watkins, Carol Crooks, Yvonne Lee, Linda Marron the undersigned will move this Court before the Hon. Richard Owen, in his regularly assigned courtroom on May 19, 1977 at 2:15 p.m. for an order: 1) pursuant to F.R.C.P., §65 preliminarily enjoining Defendants from assigning men correction officers to housing units at Bedford Hills Correctional Facility on the grounds that such assignments violate the inmates' constitutionally guaranteed right to personal security and integrity, 2) pursuant to F.R.C.P., §23 (c) (1), certifying the action as a Class Action on behalf of all women inmates who are or may be incarcerated at Bedford Hills and a sub-class consisting of all Muslim women inmates who are or may be incarcerated At Bedford Hills, and 3) for such other and further relief as to the Court may seem just and proper.

15a

Yours, etc.

A handwritten signature in dark ink, appearing to read "Emilio P. Gautier", written in a cursive style.

EMILIO P. GAUTIER, ESQ.,
Project Director
BRONX LEGAL SERVICES, CORP. C.
579 Courtlandt Avenue
Bronx, New York 10451
Tel. 212-993-6250
STEPHEN M. LATIMER, Of Counsel
Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IOLA FORTS, ET. AL.,

Plaintiffs,

-against-

BENJAMIN WARD, ET. AL.,

Defendants.

:

:

:

AFFIDAVIT

77 Civ. 1560
(R. D.)

BERNIDIENNE WATKINS, being duly sworn, says: I am an inmate at Bedford Hills Correctional Facility. I make this affidavit in support of a motion for injunctive relief.

I live on corridor at Bedford Hills, I am an Orthodox (Sunni) Muslim. The religion of Islam states that muslim women are to be completely covered in dress and are only allowed to expose their hands, face and feet to men who are not blood relatives. Before men guards were assigned to the living corridors and only women were in the living areas, we Muslim women were given permission to have our head, arms and legs uncovered for the purpose of bathing, comfort and work.

Since the men correction officers have been assigned to the living units, it has become almost impossible to adhere to this aspect of my religion. Men correction officers have been told that they do not have to announce themselves

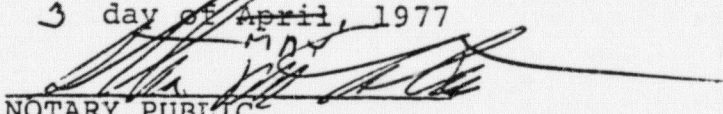
17a

when they come onto the corridor, and they almost never bother to do so. The men correction officers look over the curtains which we use to cover the doorways to our cells when we are on the toilet. They pull these curtains down for no good reason, and they also roam in and around the corridor.

I am upset that men correction officers are able to enter the corridor without warning which increases the possibility of an unnecessarily embarrassing situation. I feel that this situation seriously infringes upon my right to practice my religion properly. Because of all these reasons, I respectfully request that the practice of allowing men c.o.'s in the Bedford Hills corridors, toilets, showers and hospital be enjoined.

Bernidienne Watkins
BERNIDIENNE WATKINS

Sworn to before me this
3 day of April, 1977


NOTARY PUBLIC

STEPHEN M. LATIMER
Notary Public, State of New York
No. 05-7438820
Qualified in Bronx County
Commission Expires March 30, 1978

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IOLA FORTS, ET. AL.,

Plaintiffs,

AFFIDAVIT

-against-

BENJAMIN WARD, ET. AL.,

Defendants.

: 77 Civ. 1560
(R. D.)

_____:

CAROL CROOKS, being duly sworn, says:

I am an inmate at Bedford Hills Correctional Facility.
I make this affidavit in support of a motion for injunctive relief.

I live on Corridor "17" at Bedford Hills. I am very
upset at the presence of men guards in the prison, especially
when these men guards are working on the residence corridors,
at the toilets and showers and in the hospital. There have
been many times when I have been in my room on the toilet with
the curtain pulled across the doorway that men guards have
come down the corridor and looked at me either over the curtain
or by pulling the curtain aside. The men guards know that when
we, women inmates, have our curtain pulled across the doorway,
it means that we are on the toilet or taking care of our
personal bodily functions. When I ask the men guards to leave

cc

the door of my room and stop looking at me while I'm on the toilet, they usually laugh or make vulgar remarks. They don't leave until they want to leave.

I have also been in the prison hospital many times when men guards have been working. The women inmates are often dressed only in hospital gowns and are receiving medication and being examined for personal female medical problems. It is extremely embarrassing and degrading to have to go through these medical examinations while men guards are standing around, watching you be examined and listening to your conversation with the nurses and doctors.

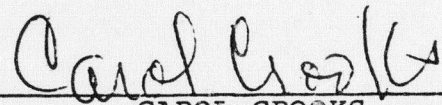
The men guards are constantly on the halls, walking up and down the corridors looking into my room and the other women's rooms at any time of the day or night. Men guards have come into the shower room while I am drying myself and watched as I dried and dressed myself.

The men guards never announce their presence when they come onto the halls so that we might, at least, have the chance to make sure that we are fully clothed or not using the toilet. On two separate occasions, I saw and heard one guard take a male guard down my corridor and tell that man that he didn't have to announce his presence when he came on the corridor, that he had the right to check and look into any of the rooms without finding out whether the woman was dressed first, and that it was part of the man guard's "job" to go into the showers and check on the women, even though we are undressed at the time.

Finally, I am particularly upset that men guards are allowed to intrude on my privacy and see me in the nude whenever they choose to do so because, as a practicing muslim woman, I am required by my religion not to allow men who are not my blood relations to see me unclothed. I feel that by allowing men guards to supervise the place where I live, sleep, take showers and take care of other personal and hygienic needs, the prison administration is violating my right to practice my religion as I am required to do.

When I am subjected to this kind of treatment by men guards, I feel degraded and humiliated. By denying me of my privacy at all, it seems like the prison system is trying to impose on me a new form of punishment.

Because of all these reasons, I respectfully request that the practice of allowing men guards in the Bedford Hills housing units, toilets, showers and hospital be enjoined.


CAROL CROOKS

Sworn to before me, this
3 day of April, 1977.



STEPHEN J. MATIMER
Notary Public, State of New York
No. 0074-0000
Qualified in Bronx County
Commission Expires March 30, 1978

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IOLA FORTS, ET. AL.,

Plaintiffs,

AFFIDAVIT

-against-

BENJAMIN WARD, ET. AL.,

Defendants.

77 Civ. 1560
R. D.)

YVONNE LEE, being duly sworn, says:

I am an inmate at Bedford Hills Correctional Facility. I make this affidavit in support of a motion for injunctive relief.

I live on Corridor 114 D. I have been greatly disturbed by the increasing use of men as corrections officers both on the living corridor and in the hispital.

On several occasions, C.O. Andrew Jackson, while walking down 114-D to take count, looked over the curtain drawn across my cell doorway and caught me on the toilet. The only reason why we ever have the curtain drawn across our doorways is for privacy while we are taking care of ourpersonal bodily needs. Although my curtain was drawn across the doorway, Jackson did not call to see if I was there, but deliberately looked over the curtain at me. I felt humiliated and degraded. It is also embarrassing that male guards are sent around to take the

2 a

6:30 a.m. count. I am usually asleep, and I feel very awkward about being awakened and peered at by these men guards when I am completely unable to control what position they observe me sleeping in.

I have also noticed that during evening school the bathroom door is kept locked, and we must ask a man guard to let us in and out. When the man guard opens the door to let the women use the bathroom, he stands by the door so that when the woman opens the door, the guard can look inside the bathroom and see the other women fixing their clothes and slips, and pulling their blouses down into their skirts.

Finally, I feel very awkward that men are assigned as C.O.'s at the hospital. One time (March 24, 1977), I went to the hospital and was describing to the nurse what my problem which was of a personal, female nature. There was a man guard directly in front of the medication window, where the nurse was. I was very embarrassed to have to describe the problem in front of the man guard.

For the above reasons, I respectfully request that Defendants be preliminarily enjoined from keeping men guards in housing units at the prison.

Sworn to before me, this
3rd day of April, 1977.

Yvonne Lee
YVONNE LEE

[Signature]
Notary Public
New York
Qualified to Perform
Mar 13 1977

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IOLA FORTS, ET. AL.,

Plaintiffs,

AFFIDAVIT

-against-

: 77 Civ. 1560 (R.D.)

BENJAMIN WARD, ET. AL.,

Defendants.

LINDA MARRON, being duly sworn, says:

I am an inmate at Bedford Hills Correctional Facility. I make this affidavit in support of a motion for injunctive relief.

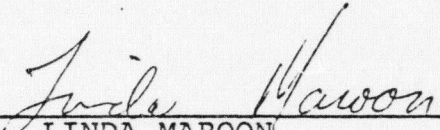
I live on Corridor 113-A at Bedford Hills. I was in segregation around the end of January. Men guards were constantly assigned to segregation. There is very little privacy in the seg. cells, and my particular cell had at least one broken window in the door.

On our about January 27, 1977, I was seated on the toilet in my cell, when I looked up and saw corrections officer Lopez looking in on me. I was totally embarrassed and humiliated.

In addition to watching while we are using the toilet, dressing on corridor, the men guards also use abusive

2₄a

and dirty language to us. These men guards don't have any respect for us women at all.


LINDA MAROON

Sworn to before me, this
3 day of ~~April~~, 1977.
MAY


NOTARY PUBLIC
STEPHEN M. LATIMER
Notary Public, State of New York
No. 00-7438510
Qualified in Bronx County
Commission Expires March 30, 1978

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IOLA FORTS, ET. AL.,

Plaintiffs,

77 Civ. 1560 (R.O.)

-against-

BENJAMIN WARD, ET. AL.,

Defendants.

MEMORANDUM IN SUPPORT OF MOTION
FOR PRELIMINARY INJUNCTION AND
TO DETERMINE THE CLASS

STATEMENT

Plaintiffs commenced a Class Action on behalf of all women inmates at Bedford Hills Correctional Facility ("Bedford Hills"), against responsible officials of the Department of Correctional Services and Council 82, AFSCME, the collective bargaining agent for New York State Correction Officers, to enjoin the placement of men guards on housing units and other areas of Bedford Hills, where women inmates would normally expect a degree of bodily privacy. Plaintiffs contend that the presence of men guards in areas of the prison where the women might, in the normal course be nude or partially clad, violates their constitutionally protected

right of privacy and personal integrity, and constitutes cruel and unusual punishment in violation of the Eighth Amendment.

Muslim inmates also claim that this unwarranted exposure of their bodies to men forces them to violate the basic tenet of their religion that they be modest at all times. They are thus denied the right to freely exercise their religion in violation of the First Amendment.

The policy complained of affects all inmates at Bedford Hills, thus making appropriate class relief. Plaintiffs contend that the harm suffered is irreparable, and cannot be adequately compensated if Plaintiffs are ultimately successful. This, then, is a situation where a mandatory injunction is necessary to preserve the status quo ante. As Chief Justice Taft said while sitting as a Circuit Judge:

"The office of a preliminary injunction is to preserve the status quo until, upon final hearing, the court may grant full relief. Generally, this can be accomplished by an injunction prohibitory in form, but it sometimes happens that the status quo is a condition not of rest, but of action, and the condition of rest is exactly what will inflict the irreparable injury upon complainant, which he appeals to a court of equity to protect him from. In such a case courts of equity issue mandatory writs before the case is heard on its merits." Toledo A.D. & N.M. Ry. Co. v. Penn. Co., 54 F. 730, 741 (C.C.D.N., Ohio 1893).

F A C T S

Bedford Hills is the only medium security general confinement prison solely for women who have been convicted of felonies in New York State. Prior to July 1976, no men correction officers were regularly assigned to Bedford Hills. In July men correction officers were first assigned to the prison prior to February 1977, with the exception of Building No. 111, the Special Housing Unit, they were not assigned to housing units as defined in the complaint.

In October 1976, Commissioner Ward issued a directive which permitted assignment of correction officers to the various prisons in New York State regardless of sex. In or about the month of February 1977, pursuant to Article 25 of the contract between Council 82 AFSCME, AFL-CIO, job and shift assignments were made according to seniority at Bedford Hills. This resulted in men correction officers being assigned to each housing unit.

Men enter the living corridors unannounced, and peer into the womens' cells without prior notice. They observe the women nude and in various stages of undress without any justifiable security reasons. These men guards observe women sitting on the toilet in their cells performing excretory and feminine hygiene functions. This has caused Plaintiffs and other members of the Class to be embarrassed, humiliated and degraded unnecessarily.

POINT I

THE PRESENCE OF MEN GUARDS ON THE HOUSING UNITS CONSTITUTES AN UNWARRANTED INVASION OF PRIVACY IN VIOLATION OF THE FIRST, FOURTH AND EIGHTH AMENDMENTS.

The right of personal privacy while not specifically enumerated in the Constitution, is a right that the Supreme Court has recognized as fundamental, Roe v. Wade, 410 U.S. 113, 152 (1973), and within the penumbra of the guarantees of the Bill of Rights, Griswold v. Connecticut, 381 U.S. 479, 484 (1965). The constitutional foundations of the right of personal privacy were best stated by Mr. Justice Blackmun speaking for the majority in Roe v. Wade, 410 U.S. at 152:

In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in the First Amendment, Stanley v. Georgia, 394 U.S. 557, 564, 89 S. Ct. 1243, 1247, 22 L.Ed. 2d 542 (1969); in the Fourth and Fifth Amendments, Terry v. Ohio, 392 U.S. 1, 8-9, 88 S. Ct. 1868, 1872 1873, 20 L.Ed.2d 889 (1968), Katz v. United States, 389 U.S. 347, 350, 88 S. Ct. 507, 510, 19 L.Ed.2d. 576 (1967); Boyd v. United States, 116 U.S. 616, 6 S. Ct. 524, 29 L.Ed.746 (1886), see Olmstead v. United States, 277 U.S. 438, 478, 48 S. Ct. 564, 572, 72 L.Ed. 944 (1928) (Brandeis, J., dissenting); in the penumbras of the Bill of Rights, Griswold v. Connecticut, 381 U.S., at 484-485, 85 S. Ct., at 1681, 1682; in the Ninth Amendment, *id.*, at 486, 85 S.Ct. at 1682 (Goldberg J., concurring); or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment, see Meyer v. Nebraska, 262 U.S. 390, 399, 43 S. Ct. 625, 626, 67 L.Ed. 1042 (1923).

See also, Stanford v. State of Texas, 379 U.S. 476, 485 (1965). Thus, as Justice Goldberg said in his concurrence in Griswold, supra, 381 U.S. at 494, "[T]he right of privacy," "is a fundamental personal right, emanating 'from the totality of the constitutional scheme under which we live.'" Marriage, being a historic right retained by the people, is one of the areas in which the due process clause provides a right of privacy.

In Stanley v. Georgia, 394 U.S. 557 (1969), the Court relied on Griswold to extend the First Amendment right of privacy to possession of pornography in one's own house: "also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy." Id. at 564. Eisenstadt v. Baird, 405 U.S. 438 (1972), emphasized that the right of privacy was not merely a marital right, but one which attached to the individual: "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." Id. at 953, citing Stanley. Because privacy is a fundamental right, the Court in all of these cases, held a compelling state interest necessary for abridgment of the right.

Basic to the protected zone of privacy is the necessity to protect an individual's personal integrity.

Most recently the Supreme Court, in holding that corporal punishment in the schools implicates a Fourteenth Amendment liberty interest, stated "[a]mong the historic liberties so protected was a right to be free from, and to obtain judicial relief for, unjustified intrusions on personal security." Ingraham v. Wright, 45 U.S.L.W. 4364, 4370 (U.S., April 19, 1977). The Court then said:

The right of personal security is also protected by the Fourth Amendment, which was made applicable to the States through the Fourteenth because its protection was viewed as "implicit in the 'concept of ordered liberty'... enshrined in the history and the basic constitutional documents of English-speaking peoples." Wolff v. Colorado, 338 U.S. 25, 27-28 (1949). It has been said of the Fourth Amendment that its "overriding function...is to protect personal privacy and dignity against unwarranted intrusion by the State." Schmerber v. California, 384 U.S. 757, 767 (1966); 45 U.S.L.W. at 4370 n. 42.

The Second Circuit has held that "[p]rivacy essential to individual dignity and personal liberty underlies the fundamental rights guaranteed in the Bill of Rights (citing cases)." Galella v. Onasis, 487 F.2d. 986, 995 n. 12. See also Child v. Beame, 412 F. Supp. 593, 602, (S.D.N.Y. 1976) (three Judge Court) app. pending U.S. The present state of the privacy right in this Circuit was best stated by Judge Friendly in Roe v. Ingraham, 480 F.2d. 102, 107 (2nd Cir., 1973):

Although, as we recently indicated in Rosenberg v. Martin, 478 F.2d. 520, at 524 (2nd Cir., 1973), the right to privacy which thus far has been granted constitutional protection relates only to "the most intimate phases of personal life," having to do with sexual intercourse and its possible consequences, it is not "obvious" that the right will be thus confined. Indeed, the Court's recognition in Roe v. Wade, supra, 410 U.S. at 153, 93 S. Ct. at 727, that the right to privacy is "founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action" itself suggests that the right may not be so closely cabined.

To synthesize, the right of privacy, as a constitutional right, includes the right of personal security, Ingraham v. Wright, supra. Personal security means the right of the individual, in the most intimate phases of his or her personal life, to be free of unwarranted intrusion by the State. Thus, in York v. Story, 324 F.2d 450 (9th Cir., 1963), the Court held that a cause of action was stated under 42 U.S.C., 1983 when Plaintiff alleged that she was arrested on a charge of assault and was forced to strip nude by the police and be photographed nude by them. In the non-governmental area several states have enacted "peeping Tom statutes" to protect against unwarranted and uninvited exposure of the person to the gaze of another in the privacy of the home. See, e.g., 41 Ark. Stat. Annot., §1425, 11 Del. Code Annot., §822, 26 Ga. Code Annot. §3002, Ind. Code, 35-30-8-1, L.S.A.-R.S. 14: 282 (Louisiana) 17 M.R.S.A., §3960 (Maine) Annot. Code of

Md. Art. 27, §580, Sec. 2412.5 Miss. Code, 1942 Annot. (1956), 14 N. Car. Stat., §202, 21 Okla. Stat. Annot., §1171, 16 S. Car. Code, §554, 39 Tenn. Code Annot., §212, Va. Code Annot., §18.2-130.

While the right of privacy is circumscribed by the exigencies of the prison environment, it does exist. Thus prisoners have a right to private and confidential communications with their attorneys. Procunier v. Martinez, 416 U.S. 396, 413-14 (1974). Two District Courts have recently held that under certain circumstances searches by guards which include a visual inspection of the anal cavity violates the prisoner's right of personal integrity on Fourth Amendment grounds. Frazier v. Ward, 425 F. Supp. 1354 (N.D.N.Y. 1977), Hodges v. Klein, 412 F. Supp. 896 (D.N.J. 1976). See also, Bonner v. Goughlin, 517 F.2d 1311 (7th Cir. 1975), (Stevens, J.).

Two District Courts have found it necessary to tailor their decisions in Title VII employment discrimination cases to permit women correction officers to be employed in mens' prisons in areas other than housing units in order to protect the inmates' personal integrity. In Reynolds v. Wise, 375 F. Supp. 145 (N.D. Tx. 1974), the Court found that the State was legally required to hire women to work in male prisons but that "[s]elective work responsibility among correctional officers excluding from the duties of women assignment to dormitories or shake-downs is reasonable to insure privacy of inmates and does not discriminate against women." *Id.* at

151. Likewise, in Mieth v. Dothard, 418 F. Supp. 1169, 1185 (M.D. Ala. 1976), prob. jur. noted 97 S. Ct. 483 (1976), the Court ordered that women be hired as guards in male prisons but specifically permitted "selective work responsibilities for correction counselors to respect the inmate's right of privacy." To the same effect see City of Philadelphia v. Pa. Human Relations Commn., 300 A.2d 97 (Pa. Comm. Ct. 1973).

The right of personal integrity and security encompassed in the term "privacy" is indeed a fundamental one. As such, it cannot be abridged unless the State can show a need legitimately related to prison order and security. Procunier v. Martinez, supra. That need must be measured against the constitutional right, and the degree to which it has been impaired. Smith v. Robbins, 328 F. Supp. 162 (S.D. Me. 1971), Palmigiano v. Travisono, 317 F. Supp. 776 (D.R.I., 1970). Where a fundamental right such as the right of privacy is at issue, the State must utilize the least restrictive alternative necessary to accomplish its ends. Pell v. Procunier, 417 U.S. 817, 826 (1974), Procunier v. Martinez, supra, 416 U.S. at 413. Palmigiano v. Travisono, supra, 317 F. Supp. at 786. Reynolds v. Wise, supra and Mieth v. Dothard, supra, suggest that employment of men correction officers at Bedford Hills in assignments and shifts other than housing units, and only women correction officers on housing units, is a viable alternative that is consistent with the legitimate needs of the prison, yet does not constitute an infringement on any one's

rights.

In In Re Long, 127 Cal. Rep., 732 (Ct. App. 1976), male inmates of an institution of the California Youth Authority complained that the presence of female staff members on living units violated their right of privacy under the U.S. and California constitutions. The California Court analyzed the relevant case law, including the decisions in Griswold, Stanley, Roe and York, and found that "[s]tatus as a correctional inmate entails an immediate loss of solitude. It does not necessarily destroy the other emotional stances and restraints forming the compound called privacy." 127 Cal. Rep. 737. To the State's argument that its policy is consistent with rehabilitative purposes and is merely a matter of administrative concern, the Court stated:

As a justification for female observers in the living units and in the toilet and shower areas of the gymnasium, it fails completely. In a normal social setting young men of 19 do not undress, bathe, void or excrete in the maternal presence. They are not forced to disrobe in the bathroom to escape female surveillance. Far from normalizing the environment, the presence of female observers in these areas of the institution violates the norms of privacy prevailing in free society. The department has offered no justification for the violation.

The logic of the Long court is even more compelling when the inmates are women and the guards who observe their most private and intimate functions are men. Western

society has traditionally extended women a greater right of privacy in their bodily and hygienic functions than it has to men. This societal norm is founded on deeply rooted moral and religious confictions in the Judeo-Christian, as well as Muslim teachings, (see Point II, infra.). Some manifestations of this tradition are that public restrooms for women are constructed to afford women more privacy than those for men; and men's locker rooms normally have common or "gang" showers while women's locker rooms normally have individual shower stalls. Similarly, men are permitted to be barechested in certain situations, e.g., while sunbathing or doing manual labor, while societal norms generally prohibit women from exposing their breasts in public.

There is a complex societal construct surrounding the viewing of women's bodies by men. The basic premise is that men often have an exploitive and voyeuristic attitude toward seeing women's nude or partially clad bodies, as witness the proliferation of "girlie" magazines and pornographic movies. Womens' reaction to these attitudes is often one of shame, embarrassment and humiliation. As a result, women who whether by accident, force or coercion, involuntarily expose their bodies to men often feel exploited, degraded and Used."

The very nature of incarceration is itself degrading because of its involuntary nature and the restraints placed on the "normal" life of the inmate. In this atmosphere the presence of men guards of the women's housing units only serves to exarcebate the sense of humiliation and shame felt

by involuntary exposure of their bodies. In this situation, as the Long Court noted "an invasion of privacy occurs which is not justified by institutional needs." 127 Cal. Rep. at 737.

A. Cruel and Unusual Punishment:

Forcing women inmates in a position where they are caused to feel this humiliation and degradation also violates the Eighth Amendment proscription against cruel and unusual punishment. That proscription is not "fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." Gregg v. Georgia, 428 U.S. 153, 171 (1976), Weems v. U.S., 217 U.S. 349, 373 (1910). In the present context, the definition in Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970), is apropos. The Court there stated that a punishment is cruel and unusual that is "unnecessarily degrading, or that is shocking or disgusting to people of reasonable sensitivity..." 309 F. Supp. at 380. Applying this standard, the Court in Frazier v. Ward, supra, 426 F. Supp. at 1367, held rectal searches on men prisoners to be cruel and unusual. Those searches are no less degrading than is the involuntary exposure by women inmates of their bodies to men guards.

POINT II

THE MUSLIM PLAINTIFFS' FIRST AMENDMENT
RIGHT TO FREELY EXERCISE THEIR
RELIGION OUTWEIGHS ANY STATE INTEREST
IN PLACING MEN GUARDS ON HOUSING UNITS.

It is well established that the First Amendment freedoms occupy a preferred position in the panoply of rights secured by the Constitution. In Girouard v. U.S., 327 U.S. 61 at 68 (1946), the Supreme Court stated:

"The struggle for religious liberty has through the centuries been an effort to accommodate the demands of the State to the conscience of the individual. The victory for freedom of through recorded in our Bill of Rights recognizes that in the domain of conscience there is a moral power higher than the State."

The scope of First Amendment protection for prisoners was summarized by the Court in Monroe v. Bombard, 422 F. Supp. 211, 216 (S.D.N.Y. 1976):

In the context of First Amendment liberties, courts have frequently intervened to insure that the rights of prisoners to practice their religious beliefs were given adequate scope. Thus, "reasonable opportunities must be afforded to all prisoners to exercise the religious freedom guaranteed by the First and Fourteenth Amendments without fear of penalty," Cruz v. Beto, 405 U.S. 319, 322, 92 S. Ct. 1079, 1081, 31 L.Ed. 2d 263 n. 2 (1972). See Cooper v. Pate, 378 U.S. 546, 84 S. Ct. 1733, 12 L.Ed. 2d 1030 (1964); Mukmuk v. Commissioner of Dept. of Correctional Services, 529 F.2d 272, 275 (2d Cir. 1976); Kahane v. Carlson, 527 F.2d 492, 495 (2d Cir. 1975);

LaReau v. MacDougall, 473 F.2d 974 979 (2d Cir. 1972), cert. denied, 414 U.S. 878, 94 S. Ct. 49, 38 L.Ed.2d 123 (1973); Pierce v. LaVallee, 293 F.2d 233 (2d Cir. 1961); Maquire v. Wilkinson, 415 F. Supp. 637, 639 (D. Conn. 1975); see also, Pell v. Procunier, 417 U.S. 817, 822, 94 S. Ct. 2800, 41 L.Ed.2d 495 (1974); Sostre v. McGinnis, 334 F.2d 906, 908 (2d Cir.), cert. denied, 379 U.S. 892, 85 S. Ct. 168, 13 L.Ed.2d 96 (1964). What emerges is the government's obligation to reconcile a prisoner's First Amendment right to the free exercise of religion "with his status as a prisoner or with the legitimate penological objectives of the corrections system." Pell v. Procunier, supra, 417 U.S. at 822, 825-26, 94 S.Ct. at 2804. See also, Kahane v. Carlson, supra, 527 F.2d at 495.

Before religious liberty of a prisoner may be abridged the State must show a compelling and substantial interest in so doing. Sherbert v. Verner, 374 U.S. 398, 403 (1963). In this Circuit, a compelling interest does not exist unless the State can show that it has an important objective in restraining the prisoner's religious liberty, and then only if the restraint is rationally related to achieving that objective. Monroe v. Bombard, supra, La Reau v. MacDougall, 473 F.2d 974, 979 (2d Cir. 1972), cert. den. 414 U.S. 878 (1973). Even if the institutional purpose is legitimate "that purpose cannot be pursued by means that broadly stifle fundamental liberties when the end can be more narrowly achieved." Shelton v. Tucker, 364 U.S. 479 (1960). Thus the same criteria required to justify an invasion of privacy

must be met if the state seeks to infringe on Plaintiffs religious liberty.

Muslim women are commanded by the teachings of the religion to be modest at all times. The Holy Qur'an, Chap. 22 (The Light), verses 30 and 31, require men and women to "lower their gaze and guard their modesty." Verse 31 prohibits women from displaying their bodies to any man outside the first degree of consanguinity. The presence of men guards on the housing corridors in the manner alleged absolutely prevents the Muslims from complying with this command. In view of the availability of women guards for duty on the housing units, there can be no compelling interest in forcing the women to violate their religious beliefs.

POINT III

THE ACTION MAY BE MAINTAINED AS
A CLASS ACTION PURSUANT TO
F.R.C.P. 23 (a) and (b) (2).

It has been held that:

In actions involving the civil rights of inmates, class action determination should be made where those actions involve also procedures or practices of the prison administration that are challenged on constitutional basis. See Gomes v. Travisono, 353 F. Supp. 457 (D.C.R.I., 1973); Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972); Anderson v. Nossner, 438 F.2d 183 (5th Cir. 1971); Jackson v. Bishop, 404 F.2d 571 (8th Cir. (1968)).

Ault v. Holmes, 369 F. Supp. 288, 291 (W.D., Ken. 1973),
Wilwording v. Swenson, 404 U.S. 249, 251 (1971), citing
 with approval Jackson v. Bishop, supra (Blackmun, J.).

Plaintiffs challenge administration practices that affect every inmate in the prison in fundamental ways. They satisfy the requirements of F.R.C.P., §23 (a), which permits a Class Action to be maintained if:

- (1) The Class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the Class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the Class, (4) the representative parties will fairly and adequately protect the interests of the Class.

1) The Requirement of Numerosity:

It is generally held that when there is a constitutional challenge to procedures of the administration, the Class may include the entire prison population. Clayton v. Jones, 463 F.2d 1182 (5th Cir. 1972), Hayes v. Secretary of Dept. of Public Safety, 455 F.2d 798 (4th Cir. 1972), Inmates of Attica Correctional Facility v. Rockefeller, 453 F.2d 12, 24 (2nd Cir. 1971), Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968), Biagiarelli v. Sielaff, 349 F. Supp. 913 (W.D., Pa. 1972), remanded for consideration of other issues, 483 F.2d 508 (3rd Cir. 1973). In Powell v. Ward, S.D.N.Y. 74 Civ. 4628, (Memo end. March 27, 1975), the Court certified a Class consisting of all women inmates at Bedford Hills who are or may

subject to certain disciplinary proceedings.

The population of Bedford Hills is even greater now than it was in 1975. The problems of joining 400 Plaintiffs are imponderable. The Class is there so numerous as to make joinder impracticable.

2) There Are Questions of Law or Fact Common to The Class And The Requirement of Typicality.

Class based relief is particularly appropriate when there is a constitutional challenge to practices which may affect every prisoner in an institution. McDonnell v. Wolff, 418 U.S. 539 (1974), Clayton v. Jones, supra, Hayes v. Secretary, supra, Inmates of Attica Correctional Facility v. Rockefeller, supra, Jackson v. Bishop, supra, Ault v. Holmes, supra, Biagiarelli v. Sielaff, supra, Rhem v. McGrath, 326 F. Supp. 681 (S.D.N.Y. 1971), Valvano v. McGrath, 325 F. Supp. 408 (E.D.N.Y. 1971). Placement of men guards on housing units subjects every woman in the prison to the invasions of privacy discussed in Point I. The pervasive intrusion of men into these areas violates the right of personal integrity of every woman inmate in the prison. Thus, the factual and legal issues raised in the action are common to all.

The requirement that the claims of the representative parties be typical of the claims of the Class is often equated with the requirement of commonality. 3B Moore's Federal Practice, §23.06-1, 23.06-2. The typicality requirement exists to ensure that Plaintiffs' interests are not antagonistic to

those of the rest of the class. Mersay v. First Republic Corporation of America, 43 F.R.D., 465 (S.D.N.Y. 1968), Weiss v. Tenney Corporation, 47 F.R.D. 283 (S.D.N.Y. 1969). All prisoners have a vested interest in assuring that there will not be any unwarranted intrusion into their personal security. There is therefore no possible antagonism between Plaintiffs and the rest of the class.

3) The Representative Parties Will Fairly and Adequately Represent The Interests of The Class.

The Court of Appeals for the Second Circuit has interpreted F.R.C.P., 23 (a) (4) to mean "[t]hat the parties' attorneys be qualified, experienced and generally able to conduct the proposed litigation." Eisen v. Carlisle-Jacqueline, 391 F.2d 555 (2nd Cir. 1968). Bronx Legal Services has assigned an experienced Federal litigator to prosecute the action. He is an experienced prisoners' rights attorney, and has represented City and State prisoners in a variety of actions. Plaintiffs are forceful and responsible advocates for the rights of the Class, and their attorneys will fairly and adequately advocate the rights and interests of the Class.

4) The Action Is Maintainable As a Class Action Under F.R.C.P., 23 (b) (2).

F.R.C.P. 23 (b) (2) permits class based relief when the Defendants have "acted or refused to act on grounds generally applicable to the class." The drafters

noted that the section contemplates civil rights actions seeking final injunctive or corresponding declaratory relief. 3B Moore's Federal Practice, §23.40, p. 23-653. Thus, the cases previously cited, involving the constitutional rights of prisoners all were prosecuted as 23 (b) (2) actions. Here there can be no serious dispute that the procedures complained of are generally applicable to all prisoners at Bedford Hills, and that declaratory and injunctive relief is appropriate to vindicate Plaintiffs' fundamental rights.

5) Notice to The Class:

Due process requires that notice of the creation of the Class be given to all members of the Class. Mullane v. Central Hanover Trust Company, 339 U.S. 306, 314 (1949), Rhem v. McGrath, supra, Valvano v. McGrath, supra. Where the Class includes the inmates of a prison, it was held sufficient in Rhem and Valvano, that the notice be posted in every cell in the prison. Plaintiffs' attorneys can reproduce enough copies of the notice and deliver them to the Administration at Bedford Hills for posting in the cells.

CONCLUSION

The presence of men guards on housing units and other areas of Bedford Hills Correctional Facility where incarcerated women would normally expect a degree of bodily privacy, constitutes a violation of Plaintiffs' constitutionally protected right of privacy and personal integrity. This situation also

violates the right of incarcerated Muslim women to freely practice their religion, a right which is firmly established by the First Amendment. Additionally, subjecting women inmates to this violation of their privacy and personal integrity so that it causes them great humiliation and embarrassment, is a violation of the Eighth Amendment prohibition against cruel and unusual punishment.

The constitutional rights which are being violated in this case are fundamental rights, and, as such, they can not be abridged unless the State shows that there is an overriding legitimate state interest. The State's interest in maintaining prison security is more than satisfied by a system which allows men guards to perform "selective work responsibilities" in areas of the prison other than the housing unit, showers and hospital clinic. Women guards are fully capable of performing all work assignments in housing units and other sensitive areas, where incarcerated women would ordinarily expect to retain their personal security and integrity which they, and other people have as a matter of human decency.

The issuance of a preliminary injunction would be an appropriate and feasible remedy in this case. If an

injunction is not issued, Plaintiffs will be jsubected to irreparable injury in the form of continuing violations of their constitutional rights of privacy, freedom of religious expression and freedom from cruel and unusual punishment.

Respectfully Submitted,

EMILIO P. GAUTIER, ESQ.,
Project Director
BRONX LEGAL SERVICES, CORP. C.
579 Courtlandt Avenue
Bronx, New York 10451
Tel. 212-993-6250
STEPHEN M. LATIMER, Of Counsel
Attorneys for Plaintiffs

Law Students on the Brief:

Janet Albano
Ellen Barry
Susan Reisner

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
IOLA FORTS, et al., :

Plaintiffs, :

-against- :

BENJAMIN WARD, et al., :

Defendants. :

: AFFIDAVIT IN OPPOSITION
: TO MOTION FOR A PRELIMI-
: NARY INJUNCTION

: 77 Civ. 560
: (R.O.)

-----X
STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

MARGERY EVANS REIFLER, being duly sworn, deposes and says:

1. I am an Assistant Attorney General in the office of LOUIS J. LEFKOWITZ, Attorney General of the State of New York, attorney for defendants Ward, Clement, and Reid (hereinafter "defendants"). I submit this affidavit in opposition to plaintiffs' motion for a preliminary injunction. The information contained in paragraphs "2"- "4", "6"- "8" was obtained from Frances Clement, Superintendent of Bedford Hills Correctional Facility in Bedford Hills, New York.

A.

2. Plaintiffs complain of a lack of privacy because male correction officers are assigned to the living corridors. The inmates' rooms are lined up on corridors. Each room has a door with a window. The window has a curtain which can be closed from the inside. Ordinarily, a central switch keeps these doors deadlocked open when the women inmates are on the corridor. As detailed below. (§ "4"), individual doors will be closed on request by the inmate by the guards.

3. Each inmate has a toilet in her room. The inmates are allowed to have a partial curtain over the open doorway for privacy. Plaintiffs complain that the male guards pull the curtains aside or look over them when they are using the toilet or attending to personal business.*

4. Plaintiffs conveniently neglect to mention that prison policy permits them to request that their doors be closed and the curtains pulled over the windows for fifteen minutes at a time while they are attending to personal needs. Indeed, the rule book distributed to the inmates states:

"7. Room door windows may be covered only when residents are attending to their personal needs. Windows may be covered no more than fifteen (15) minutes at one time, and are never to be covered at times of the institutional count."

A copy of the relevant page of the inmate rule book is annexed hereto as Exhibit "A".

5. Clearly plaintiffs are not entitled to the preliminary relief they request (forbidding the placement of male guards on housing units) if they can obtain the privacy they seek merely by requesting that their doors be closed when they have private business.

2.

6. Plaintiffs complain that male guards do not announce themselves when they enter the living corridors. On May 9, 1977 Commissioner Ward of the Department of Correctional Services issued a directive entitled "Guidelines for Assignment of Male

* Although the complaint alleges that women are not allowed to have curtains over the entrance to their rooms when the doors are open (Complaint, ¶ 25), the inmate affidavits in support of the motion are in direct contravention. Watkins' affidavit, p. 2 (referring to the curtains "we use to cover the doorways to our cells"); Crooks' affidavit, p. 1 ("our curtain across the doorway"); Lee affidavit, p. 1 ("my curtain was drawn across the doorway").

and Female Correction Officers", a copy of which is attached hereto as Exhibit "B". This directive was issued to reach an appropriate accommodation between the privacy interests of the inmates and the elimination of sex discrimination in employment opportunities. Directive, "Introduction".

7. The directive specifically requires that absent emergency conditions, guards of the opposite sex must announce their presence "to avoid unnecessarily invading the privacy of inmates of the opposite sex." (Directive, ¶ 7). On May 20, Deputy Superintendent for Security Reid (as Acting Superintendent) issued a memorandum to the entire security staff which enclosed a copy of the above-mentioned directive requiring the announcement of male guards on their entrance. A copy of Reid's memorandum is annexed hereto as Exhibit "C". Assuming arguendo that there was a failure to announce prior to May, 1977, announcement is now a Departmental requirement.

C.

8. Apparently there is some complaint about male guards observing women in the shower rooms. The shower rooms front on a hallway and have plexiglass doors. Each room has a anteroom outside the actual shower stall. The stall itself has a curtain. Any inmate wishing to take extra care to protect against observation by others may turn off the shower, dry herself in the stall, and slip on a robe before stepping into the anteroom. No preliminary injunction taking the drastic step of forbidding one third the correction officers from working in the living areas is needed to protect the privacy of showering inmates.* Self-help is readily available.

* As of June, 1977 approximately 50 of 180 correction officers at Bedford were male.

9. Plaintiffs also complain of lack of privacy in the medical clinic area and hospital (sick wing). Administrator Marie E. Daly, as well as the Superintendent, inform me that absent emergency situation, no male or female correction officer is allowed beyond the waiting room of the clinic. The screening clinic, examining rooms, etc. are all private. Although there may be guards in the sick wing area, each woman is in a separate room with a door. That door is usually closed for examinations; at any time the patient may request that it be closed for privacy reasons.

10. As the above facts make clear, there is no emergency situation requiring the issuance of a preliminary injunction nor can there be irreparable harm to plaintiffs (or even a balance of equities tipping in their favor) when the alleged acts complained of can be easily avoided by plaintiffs themselves. No justification for the extraordinary relief requested has been shown.

11. Should plaintiffs put any of the above averments into issue, a hearing on the motion for a preliminary injunction must be held to determine the facts.

12. For the above stated reasons, the motion for a preliminary injunction should be denied, or in the alternative, a hearing should be held.

WHEREFORE, plaintiffs' motion for a preliminary injunction should be denied in all respects; in the alternative, an evidentiary hearing must be held.

MEX
MARGERY EVANS REILLY

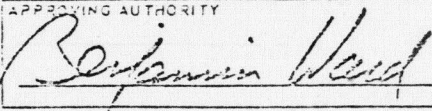
Sworn to before me this
8th day of June, 1977

K. Eileen Shapiro
Assistant Attorney General
of the State of New York

GENERAL RULES

1. Profane, vulgar or obscene language shall not be permitted.
2. Insolence in any form to the Facility employees will lead to disciplinary action. Similar action may be taken when the residents are insolent to each other.
3. Fighting between residents is strictly prohibited.
4. "Rough housing" shall not be permitted.
5. Residents shall not be permitted to congregate in blind areas such as drying rooms, broom closets, etc.
6. Personal radios are for personal pleasure; they are to remain in the resident's room and are not to be used without ear plugs.
7. Room door windows may be covered only when residents are attending to their personal needs. Windows may be covered no more than fifteen (15) minutes at one time, and are never to be covered at times of the institutional count.
8. Residents shall keep their personal clothing, bedding and living quarters clean, neat and in order. Offensive and unhygienic procedures and activities must be avoided anywhere in the Facility. Personal hygiene is of the utmost importance and will be checked by the officers.
9. Residents shall not leave their living quarters or place of assignment except by permission of the officer or employee in charge.
10. If a resident is sick or receives an injury, she shall immediately report these conditions to the employee in charge.
11. When a resident is interviewed by a staff member of the Facility, she should answer all questions fully and truthfully.
12. The Facility uniform, including uniform blouses, must be worn in all parts of the Facility. When a resident leaves her housing unit she is expected to wear the Facility uniform.

Exhibit "A"

 STATE OF NEW YORK DEPARTMENT OF CORRECTIONAL SERVICES DIRECTIVE	CLASSIFICATION #2230	DISTRIBUTION	DATE 5/9/77
	SUPERSEDES	PAGE 1 OF 2 PAGES	
APPROVING AUTHORITY 	SUBJECT Guidelines for Assignment of Male and Female Correction Officers		

I. Introduction:

It has been six months since sex certification was eliminated for the transfer and assignment of correction officers. Implementation of the policy has generally been quite successful and virtually no problems have developed. A six-month evaluation indicates, however, that some further clarification is necessary.

The trend of the courts has been to eliminate employment discrimination, and in compliance with federal law, it is the intention of the Department to maximize employment opportunities regardless of sex. It is the policy of the Department that, in the first instance, an employee's sex would neither exclude a person from assignment to a facility, nor to a particular assignment within that facility. The law, however, does, in certain instances, recognize sex as a bona fide occupational qualification. We also recognize that our desires for full employment opportunities may result in some invasion of privacy. It is our intention to reach an appropriate accommodation and, in so doing, to hold the invasion of personal privacy to a minimum.

Sound managerial judgment must be used in the assignment of any personnel. Certain assignments may be wholly inappropriate or improper, and therefore detrimental to a well run facility. Exercising managerial discretion in such assignments is consistent with the provisions of Article 25 of the New York State Agreement with Council 82 of AFSCME. The purpose of this directive is to:

- maximize full employment opportunities regardless of sex
- minimize intrusion on individual privacy
- establish guidelines to accomplish both of the above stated goals

II. Policy:

In considering individuals for job assignments, the following guidelines all apply:

1. Security staff members of the opposite sex to the inmate population are not to be permanently assigned to shower areas where one has to work in open view of showering inmates.
2. Escort duty outside of a facility shall be performed only by officers of the same sex as the inmates to be escorted.

Exhibit "B"

SUBJECT	Guidelines for Assignment of Male and Female Correction Officers	CLASSIFICATION #2230	DATE 5/9/77	PAGE 2 OF 2
---------	---	-------------------------	----------------	----------------

3. At least one officer of the same sex as the inmate population at a facility must be assigned to each housing block.
4. No assignment is to be made requiring an officer to conduct strip frisks of inmates of the opposite sex.
5. Security employees of opposite sex to the inmate population cannot exceed one-third of the total security staff at facilities designated as maximum or medium security.
6. Superintendents, with the approval of the appropriate Deputy Commissioner, can make adjustments in particular assignments based upon specific institutional needs.
7. Unless emergency conditions dictate otherwise, correction officers of the opposite sex shall announce their presence in housing areas to avoid unnecessarily invading the privacy of inmates of the opposite sex.

STATE OF NEW YORK-DEPARTMENT OF CORRECTIONAL SERVICES

MEMORANDUM

DATE: 5/20/77

TO: SECURITY STAFF

FROM: Dorothy M. Reid, Deputy Supt. - Security

SUBJECT: Information

1. With the official opening of the yards for recreation on May 30, 1977, there will be a 4:00 p.m. count instead of the 6:00 p.m. count. When the yard is not in use because of weather, the 6:00 p.m. count will be taken.
2. Spanish speaking officers are reminded that they are to use English in conversing with the resident population unless requested to interpret. It is also discourteous to converse in Spanish in the presence of non-Spanish speaking staff members.
3. Herewith attached is a copy of the recent directive #2230, "Guidelines for Assignment of Male and Female Correction Officers."

Att.
CC: Miss Clement
Mrs. Salmon
Capt. Woolley
Supervisory Staff
Time Cards of C. O.'s

Exhibit "C"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x

IOLA FORTS, et al.,	:	
Plaintiffs,	:	
- against -	:	77 Civ. 1560
	:	(R.O.)
BENJAMIN WARD, et al.,	:	
Defendants.	:	

-----x

DEFENDANTS' MEMORANDUM OF LAW
IN OPPOSITION TO PLAINTIFFS'
MOTION FOR A PRELIMINARY IN-
JUNCTION AND CLASS CERTIFICATION

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendants
Ward, Clement and Reid
Office & P.O. Address
Two World Trade Center
New York, New York 10047
Tel. No. (212) 488-3014

LEONARD J. PUGATCH
Deputy Assistant Attorney General
of Counsel

55a

TABLE OF CONTENTS

	<u>Page</u>
Preliminary Statement.....	1
Argument.....	2
Conclusion.....	10

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
IOLA PETERS, et al., :

Plaintiffs, :

- against - :

77 Civ. 1550
(L.D.)

BENJAMIN WARD, et al., :

Defendants. :

-----x
DEFENDANTS' MEMORANDUM OF DECISION
IN OPPOSITION TO PLAINTIFFS'
MOTION FOR A PRELIMINARY IN-
JUNCTION AND CLASS CERTIFICATION

Preliminary Statement

Plaintiffs commenced this action as a class action on behalf of all women inmates at the Bedford Hills Correctional Facility on or about the 11th of April, 1977 against defendants Ward, Clement and Reid, among others, to enjoin the placement of male corrections officers in housing units and other areas of Bedford Hills Correctional Facility. Plaintiffs contend that the presence of such male guards causes the plaintiffs to be "involuntarily exposed" to the aforesaid officers thereby depriving plaintiffs of their constitutionally protected right of privacy and personal integrity.

The annexed affidavit of Gary Evans Weisler, sworn to the 8th day of June, 1977 sets forth the facts and circumstances upon which this memorandum of law is based. The Court is respectfully referred to that affidavit.

ARGUMENT

1. The Preliminary Injunction

For plaintiffs to succeed in the instant application and before this Court may grant a preliminary injunction, plaintiffs must establish:

- (1) clear likelihood of success on the law and the facts then available and possible irreparable injury, or
- (2) sufficiently serious questions on the merits making them fair grounds for litigation and a balance of the equities tipping decidedly in favor of preliminary relief.

Columbia Pictures Industries, Inc.
v. American Broadcasting Companies,
Inc., 501 F. 2d 894, 897 (2d Cir.
1974).

It is clear that plaintiffs are not entitled to the preliminary relief requested. Plaintiffs' memorandum of law deals primarily with the synthesized legal theory underpinning their action. The complaint and affidavits upon which the

instant application is based must be considered together with the affidavit and exhibits submitted on behalf of the defendants. It is manifest that the plaintiffs have not supported the allegations of their complaint; that plaintiffs have failed to demonstrate a likelihood of success on the law and facts as available, and that plaintiffs have failed to demonstrate the prerequisite possible irreparable injury.

Likewise, plaintiffs have failed to raise sufficiently serious questions on the merits making them fair grounds for litigation and plaintiffs have failed to demonstrate a balance of the equities tipping decidedly in favor of preliminary relief.

The gravamen of the complaint is that the assignment of male correction officers to the housing units at the Bedford Hills Correctional Facility causes the plaintiffs to be "involuntarily exposed" to the aforesaid officers thereby depriving plaintiffs of their right to privacy.

Inmate rooms are lined on a corridor. Each room has a door with a window. Each window has a curtain. Ordinarily the doors are kept open when inmates are on the corridor. Inmates are permitted to have a partial curtain over the doorway for privacy. Each room has a toilet.

However, the complaint specifically alleges that the women inmates are not permitted to have a curtain on the window of their cell door; that they are not permitted to place a curtain on the doorway when the door is open; and that male corrections officers enter women's housing units unannounced.

The affidavits of the plaintiff inmates in support of the instant application clearly refute such allegations by repeatedly referring to the "curtains across the doorway". See paragraph "3" of the affidavit of Marjory Evans Reifler, sworn to the 8th day of June, 1977.

Moreover, prison policy permits inmates to request that the individual cell doors be closed and the window curtains drawn for fifteen (15) minutes for the express purpose of attending to personal needs. See paragraph "4" of the aforementioned affidavit.

Additionally, plaintiffs specifically allege that while taking showers women inmates are without their consent completely exposed to the view of male corrections officers. The shower rooms front on a hallway and have plexiglass doors. Each shower has an anteroom and an actual shower stall. Each stall has a curtain. Any inmate wishing to secure her right to privacy need only turn off the shower, dry herself in the stall, and slip on a robe before stepping into the anteroom.

Federal courts do not sit to supervise state prisons. The United States Supreme Court has continuously expressed the adherence that must be maintained to this doctrine of restraint from undue interference on the administration of state prisons unless federal constitutional violations and deprivations are clearly evident. Maschur v. Sano, 427 U.S. 215 (1976); Praiser v. Rodriguez, 411 U.S. 475 (1973); Cruz v. Sano, 405 U.S. 319 (1972); Johnson v. Avery, 393 U.S. 483 (1969).

Plaintiffs readily admit that their right to privacy is circumscribed by the exigencies of prison environment. Thus the Court must assess challenges to prison administration based on asserted constitutional rights of prisoners with regard to legitimate penal objectives. Pell v. Procunier, 417 U.S. 817 (1974).

In light of the recognized competing interests of the right to privacy and legitimate penal objectives, and in view of the fact that the complaint stands controverted not only by the affidavit and exhibits submitted by the defendants but also by the affidavits of the plaintiffs themselves, the plaintiffs have failed to demonstrate a clear likelihood of success on the law and facts available.

This action was commenced on or about the 11th of April, 1977. The affidavits in support of the instant motion were sworn to on the 3rd day of May, 1977. The fact that plaintiffs have at no time prior to this application requested injunctive relief for an alleged deprivation dating from February of 1977 must dictate strongly against the validity of allegations of irreparable harm.

On the 9th of May, 1977, the Commissioner of the Department of Correctional Services issued a directive entitled "Guidelines for Assignment of Male and Female Corrections Officers". This directive was issued to reach an appropriate accommodation between the privacy interests of the inmates and the elimination of sex discrimination in employment opportunities. The directive inter alia, addresses itself to the problems of assignment to shower areas, strip frisks, and announcement of presence in housing areas.

The effect of the aforementioned directive together with the facts and circumstances heretofore outlined demonstrate an absence of serious questions which are fair grounds for litigation.

The plaintiffs demand relief preliminarily enjoining the defendants from assigning male corrections officers to

housing units at Bedford Hills. Plaintiffs cannot seek the aid of this court's equity jurisdiction based upon the allegations of "involuntary exposure" depriving plaintiffs of their right to privacy. In fact, the exposure complained of must be viewed as voluntary when there are means available by which the plaintiffs by their own actions may prevent the alleged infringements.

The injunctive relief would first result in considerable inconvenience in the reassignment of one third of the facility's correctional officers, and second severely interfere with the Department of Correctional Services policy to maximize employment opportunities regardless of sex. Additionally, such a grant would necessarily interfere with the rights and obligations of the defendants under the collective bargaining agreement with Council 82. See papers submitted in opposition by the defendant Council 82. Plaintiffs have clearly not established that the equities in the case at bar tip decidedly in their favor with regard to the preliminary relief requested.

Furthermore, the granting of the preliminary injunction here would in effect give to plaintiffs the final relief they seek by enjoining the defendants from assigning male corrections officers to housing units at the Bedford Hills

Correctional Facility. It is improper to issue a preliminary injunction when such a grant would effectively provide all the relief sought in the complaint. E.g. Waldman v. United States Lawn Tennis Association, 354 F. Supp. 1241, 1249 (S.D.N.Y. 1973); Knapp v. Walder, 367 F. Supp. 385, 388 (S.D.N.Y. 1973). The effect of such a grant would subject the Department of Correctional Services and Bedford Hills Correctional Facility considerable inconvenience and expense without plaintiffs having demonstrated even a probability of success on the merits. Such a result would be a misuse of the extraordinary remedy of the preliminary injunction which is intended "to guard against a change in conditions which will hamper or prevent the granting of such relief as may be found proper after the trial of the issues." United States v. Adler's Creamery, 197 F. 2d 987, 996 (2d Cir. 1939).

For the stated reasons, plaintiffs motion for a preliminary injunction should be denied. Should plaintiffs take any of the above averments into issue, no preliminary injunction can be granted in the absence of a hearing to determine the facts.

B. The Class Action

Additionally, defendants maintain that a class action is not necessary to provide the relief sought by plaintiffs

to a group of those similarly situated. Any holding of this Court which is sustained on appeal is understood to be binding on the state as to all other similarly situated individuals. E.g. Galvan v. Levine, 490 F. 2d 1255, 1261 (2d Cir. 1973), cert. den. 417 U.S. 936 (1974). When the desired relief would automatically inure to the class, certification is "largely a formality" (Galvan, 490 F. 2d at 1261), and the motion for class status should be denied. E.g. Vulcan Society of N.Y.C. Fire Dept., Inc. v. Civil Service Com'n., 490 F. 2d 387, 399 (2d Cir. 1973); Stokes v. U.S. Immigration & Nat. Service, supra, 393 F. Supp. at 33; Thomas v. Weinberger, 384 F. Supp. 540, 543 (S.D.N.Y. 1974); McDonald v. McLucas, 371 F. Supp. 831, 833-834 (S.D.N.Y.) (three-judge court), affd. 419 U.S. 987 (1974).

Thus, for example, if this Court found that plaintiff inmates had been deprived of their right to privacy and that such action was violative of the Constitution, this declaration (if sustained on appeal) would clearly benefit all other inmates.

CONCLUSION

THE PLAINTIFFS APPLICATION FOR
A PRELIMINARY INJUNCTION AND A
CLASS CERTIFICATION SHOULD BE
DENIED.

Dated: New York, New York
June 8, 1977

Respectfully submitted,

LOUIS J. LEWIS
Attorney General of the
State of New York
Attorney for Defendants
Ward, Clement and Weid

LEONARD J. PUGH
Deputy Assistant Attorney General
of Counsel

2

2

: AFFIDAVIT IN OPPOSITION
: TO MOTION FOR PRELIMI-
: NARY INJUNCTION

: Index No. 77-Civ. 1560
Judge Owen

1. That he is Executive Director of Security Unit Employees, Council 82, American Federation of State, County and Municipal Employees, AFL-CIO (hereinafter Council 82), and is one of the defendants in the above captioned matter.
2. That he makes this affidavit in opposition to plaintiffs' motion for preliminary injunction in the above captioned matter.
3. That Council 82 is and at all times hereinafter mentioned was the duly certified and exclusive collective bargaining representative for employees employed by the State of New York in the Security Services negotiating unit. Employees with the title and/or position of Correction Officer are in said collective bargaining unit.
4. That Council 82 was initially certified by the Public Employment Relations Board as the exclusive bargaining representative for the Security Services negotiating unit in 1969.

Shortly thereafter, Council 82 commenced collective bargaining with the State of New York for a collective bargaining agreement governing the wages, hours and terms and conditions of employment for the employees in the bargaining unit.

5. Prior to the enactment of the New York State Public Employees' Fair Employment Act (hereinafter, Taylor Law) and the certification of Council 82 as the collective bargaining representative, the superintendents of the various local correctional facilities had absolute control as to the method and manner in which employees were assigned to their tasks. Employee assignments were often governed by personal favoritism and an employee could be removed from his assignment at the whim of the superintendent or other management officials. Additionally, it had been common practice for employees to be removed or reassigned based on their political affiliation.

6. Accordingly, one of the primary concerns of Council 82 when it commenced collective bargaining with the State was to seek provisions in the bargaining agreement that would prevent discrimination against any of the employees Council 82 represented and to provide an objective method of assignment to positions and/or assignments.

7. As a result of collective bargaining the State and Council 82 agreed to a provision in the 1970-1972 collective bargaining agreement entitled "Non-discrimination" (Article XII). Article XII, Section 1 of said contract provided as follows:

"The provisions of the agreement shall be applied equally to all employees without discrimination as to age, sex, marital status, race, color, creed, national origin or political affiliations.

68a

Both the employer and the union shall bear the responsibility for complying with this provision of the agreement."

8. The State and Council 82 also agreed to a provision entitled "Seniority" (Article XXI) which insured that job assignments and shift selection would be made in accordance with seniority provided the employee had the ability to properly perform the work involved.

9. A copy of the 1970-1972 collective bargaining agreement between the State and Council 82 is annexed hereto as Exhibit A.

10. Since that time, Council 82 and the State have entered into successive collective bargaining agreements for the periods 1972-74, 1974-77, and 1977-79. All of these contracts contain "non-discrimination" and "seniority" provisions substantially identical to the provisions in the 1970-72 contract mentioned above.

11. The current 1977-79 collective bargaining agreement which was signed April 13, 1977 provides in relevant part as follows:

Article 3
Non-Discrimination

" 3.1 The Employer and the union agree that the provisions of this agreement shall be applied equally to all employees in compliance with applicable law against discrimination as to age, race, creed, color, national origin, sex, disability, marital status, and political affiliation."

* * *

" 3.3 The employer agrees not to interfere with the rights of employees to become members of the union. There shall be no discrimination, interfer-

ence, restraint or coercion by the Employer or any Employer representative against any employee because of union membership or because of any employee activity permissible under the Taylor Law and this agreement in an official capacity on behalf of the Union, or for any other cause."

12. Article 24 (Seniority) of the current agreement provides in relevant part as follows:

"...job assignments and shift selection shall be made in accordance with seniority provided the employee has the ability to properly perform the work involved."

(Article 24.3)

13. Article 24.3 provides for the posting of all vacancies in shift or job assignments for a period of thirty (30) days during which employees may bid for the positions. As in the predecessor agreements, selection is to be made in accordance with seniority provided the employee has the ability to properly perform the work involved.

14. As a result, employees covered by the collective bargaining agreement negotiated by Council 82 have the right to bid for and be assigned to any position or assignment on the basis of seniority provided they have the ability to perform the job. The agreement does not permit and will not tolerate discrimination against an employee for any reason, including but not limited to his or her sex.

15. Here plaintiffs seek an order which will deprive correction officers, who happen to be male, of their contractual right to positions and/or assignments for which they successfully

70 a

bid under the collective bargaining agreement. If the injunctive relief sought by plaintiffs is granted, employees will be deprived of contractual rights solely on the basis of their sex.

16. In this regard, it must not be forgotten that patrol of corridors and housing units is a necessary part of the duties and responsibilities of a correction officer. Said patrol is essential for the correction officer to maintain order and protect harm to other inmates by inmates and harm to other correction officers by inmates.

17. It is entirely unclear as to whether or not plaintiffs seek absolute freedom from inspection or search for weapons, contraband and other unlawful materials as part of their relief requested. To that extent, such relief would create a clear and present danger to every correction officer employed at Bedford Hills as well as other inmates in the prison.

18. Your affiant is unaware of any disciplinary action taken by the Department of Correctional Services against male correction officers assigned to Bedford Hills Correctional Facility concerning or relating to alleged deprivation or mistreatment of any women inmate.

19. Inasmuch as no disciplinary action whatsoever has been taken by the Department of Correctional Services management at Bedford Hills against any correction officer concerning or relating to the claims made by plaintiffs herein, it must be assumed that the correction officers were in all respects performing their duties in a lawful and proper fashion.

20. Your affiant is also unaware of any grievances filed by plaintiffs pursuant to the inmate grievance procedure with re-

71a

spect to any particular male correction officer at Bedford Hills. As a result plaintiffs have an administrative remedy which they have not exhausted.

21. Plaintiffs have presented allegations against unnamed individuals. No dates, times, and places have been provided. It is literally impossible to determine or in any manner ascertain the truth of plaintiffs' allegations.

22. It must be noted that the contractual rights involved are not the rights of the "union" but are personal rights belonging solely to the correction officers employed at Bedford Hills. These unnamed employees are not parties to this action.

23. It is your affiant's understanding that plaintiffs are permitted by the Department to have the doors of their rooms closed for periods of "up to fifteen minutes." Their toilets are in their rooms. Therefore, plaintiffs, should they so desire, can arrange to have the door closed while they go to the bathroom or perform other hygienic functions.

24. It is your affiant's further understanding that the showers at Bedford Hills have curtains. Thus an inmate should she so desire, can "dry off" or dress in the shower without being visible from the corridor.

25. Under the circumstances, the drastic remedy of preliminary injunction would be improper.

26. Your affiant respectfully requests that the Court consider the larger implications of the relief sought by plaintiffs, particularly concerning the impact such relief would have on female correction officers employed in male facilities.

27. Several years ago, it was the practice of the De-

72a

partment of Correctional Services, with the approval of the Department of Civil Service of the State of New York, to maintain separate Civil Service lists for female and male correction officers in the areas of promotions, examinations, transfers, facilities, and job bidding.

28. However, the recent closings of many facilities formerly under the jurisdiction of the Office of Drug Abuse Services (ODAS) and the subsequent assimilation of former ODAS personnel (many of them female) into the Department of Correctional Services have made it impossible to adhere to the past practice that female officers be employed only in female facilities and male officers be employed only in all male facilities.

29. After deep and serious study of this problem by my staff and correction officers throughout the State, your affiant wrote to Commissioner Ward requesting that sex be eliminated as a criterion for examinations, that a single transfer list be maintained, and that seniority under the collective bargaining agreement be the only criterion used in the selection of officers from the transfer list etc.

30. On or about October 26, 1976, Deputy Commissioner Douglass sent a memorandum to all correctional facilities stating that the sex classification for correction officers was being eliminated, and that all officers, regardless of sex would be permitted to bid for assignments or positions pursuant to Article 25 (now Article 24) of Council 82's contract with the State. A copy of the Douglass memorandum is annexed hereto as "Exhibit B."

31. Our union will not be a party to sexual discrimination against any employee it represents. Granting the relief re-

73a

quested here will necessarily result in the removal of female correction officers from "bid jobs" in male institutions, jobs they presently perform diligently and competently, solely because of their sex.

32. Granting injunctive relief would also disqualify employees from bidding for assignments in futuro solely because of their sex, in violation of the contract and applicable law.

33. Your affiant believes that granting the preliminary injunction would constitute a complete deprivation of the rights of employees, who are full fledged citizens of the United States with all the privileges and immunities appurtenant thereto, who have committed no crimes, and are constructive citizens and taxpayers of the State of New York.

WHEREFORE, your affiant respectfully prays that this Court deny plaintiffs' application for a preliminary injunction in all respects and for such other and further relief as the Court may deem just and proper.



CARL F. GRAY

Sworn to before me this
7th day of June, 1977.



NOTARY PUBLIC

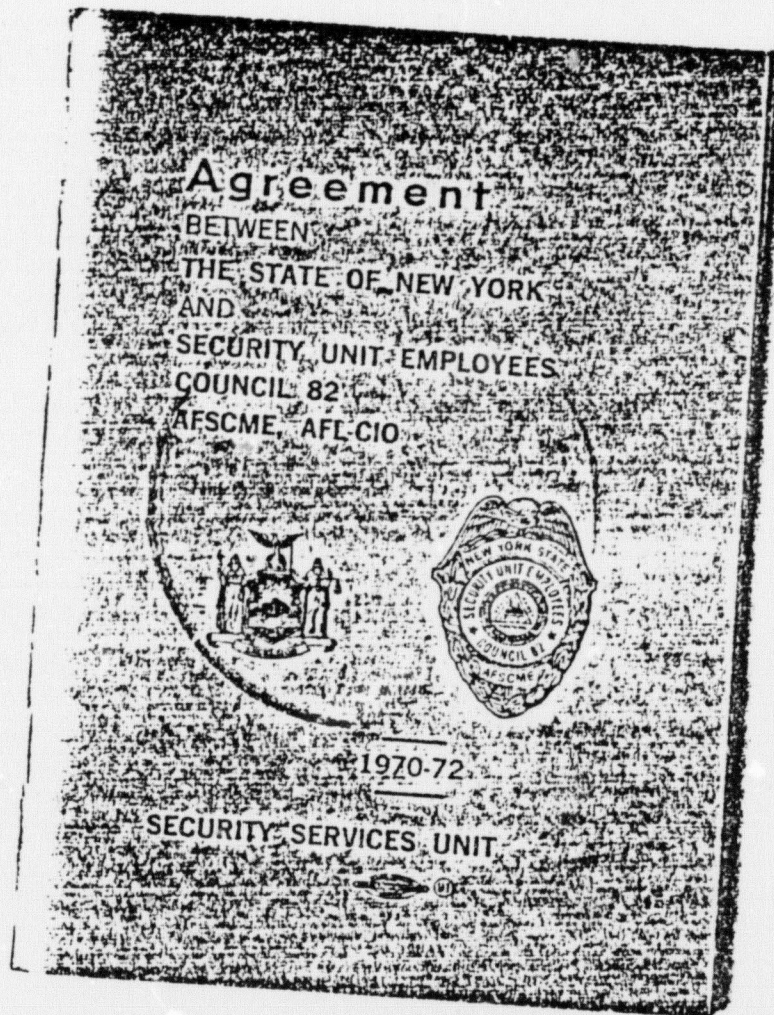


Exhibit A

TABLE OF CONTENTS

	Page
PREAMBLE	7
BILL OF RIGHTS	7
ARTICLE 1	8
Term of Agreement	8
ARTICLE 2	10
Recognition	10
ARTICLE 3	10
No Strike Clause	10
ARTICLE 4	10
Management Rights	10
ARTICLE 5	11
Checkoff	11
ARTICLE 6	18
Grievance and Arbitration Procedures	18
ARTICLE 7	19
Disciplinary Proceedings and Appeals	19
ARTICLE 8	20
Salaries	20
ARTICLE 9	21
Retirement	21
ARTICLE 10	21
Health Insurance	21
ARTICLE 11	22
Access to Employees and Meeting Space	22
ARTICLE 12	23
Non-Discrimination	23
ARTICLE 13	24
Bulletin Boards	24
ARTICLE 14	24
Vacation Credits	24

ARTICLE 15	27
Personal Leave	
ARTICLE 16	28
Bereavement Leave	
ARTICLE 17	28
Sick Leave Accumulation	
ARTICLE 18	28
Leave—Probationary Employees	
ARTICLE 19	29
Safety Standards	
ARTICLE 20	29
Liability Coverage	
ARTICLE 21	29
Seniority	
ARTICLE 22	31
Disciplinary Transfers	
ARTICLE 23	31
Overtime	
ARTICLE 24	33
Recall	
ARTICLE 25	33
Shift Changes	
ARTICLE 26	35
Holiday Pay	
ARTICLE 27	36
Alternate Examination Dates	
ARTICLE 28	37
Review of Personal History Folder	
ARTICLE 29	38
Labor Management Committees	
ARTICLE 30	38
Absence—Extraordinary Circumstances	

ARTICLE 31	39
Travel Allowances	
ARTICLE 32	40
Workmen's Compensation Leave	
ARTICLE 33	42
Reimbursement for Property Damage	
ARTICLE 34	43
Employee Organization Leave	
ARTICLE 35	44
Jury Duty	
ARTICLE 36	45
Credit Union Deduction	
ARTICLE 37	46
Uniforms	
ARTICLE 38	47
Payroll Computation	
ARTICLE 39	47
Agency Shop	
ARTICLE 40	48
Memorandum Packets	
ARTICLE 41	48
Preservation of Benefits	
ARTICLE 42	49
Savings Clause	
ARTICLE 43	49
Printing of Agreement	
ARTICLE 44	50
Approval of the Legislature	
ARTICLE 45	50
Conclusion of Collective Negotiations	
ARTICLE 46	51
Unchallenged Representation	

APPENDIX A	
Salaries	53
§ 1. Implementation	53
§ 2. General Salary Increase	54
§ 3. Extension of Prior Minimum Salary Increases	54
§ 4. Minimum Annual Salary	55
§ 5. Full Minimum Salary Increase Upon Promotion	56
§ 6. Extension of Prior Minimum Salary Increases to Employees in Unallocated Positions Who Are Subsequently Transferred to Allocated Positions	57
§ 7. Locational Compensation	57
§ 8. Salary Schedule and Elimination of First Salary Step	57
APPENDIX B	
Retirement	58
§ 1. Implementation	58
§ 2. Improved Retirement Benefit	58
§ 3. Sick Leave Credits	60
§ 4. Survivor's Benefit for Retired Employees	60
§ 5. Military Credit	61
§ 6. Joint Employer-Union Committee and Reopener	61
§ 7. Reopen Transfer Opportunity	62
§ 8. Special Interest	63
§ 9. World War II Credit	63
§ 10. Guaranteed Death Benefit	65
§ 11. Temporary Retirement Benefits	65
APPENDIX C	
Health Insurance	65

PREAMBLE

This Agreement entered into by the Executive Branch of the State of New York hereinafter referred to as the "Employer" and Security Unit Employees Council 82, American Federation of State, County and Municipal Employees, AFL-CIO, hereinafter referred to as the "Union" has as its purpose the promotion of harmonious employee relations between the Employer and the Union, the establishment of an equitable and peaceful procedure for the resolution of differences and the establishment of salaries, wages, hours of work and other terms and conditions of employment.

BILL OF RIGHTS

To insure that individual rights of employees in the Security Services Unit are not violated, the following shall represent the Employees' Bill of Rights.

—an employee shall be entitled to Union representation at each and every step of the grievance procedure set forth in this Agreement,

—an employee shall be entitled to Union representation at each stage of a disciplinary proceeding brought pursuant to Section 75 of the Civil Service Law,

—no employee shall be required by the Employer to submit to an interrogation after charges under Section 75 have been served unless he is afforded the opportunity of having a Union representative present,

—no recording devices of any kind shall be used during such interrogation unless the Union is made aware of the fact prior to such interrogation,

—in all disciplinary hearings under Section 75 the employee shall be presumed innocent until proven guilty, and

—an employee shall not be coerced or intimidated or suffer any reprisals either directly or indirectly that may adversely affect his hours, wages or working conditions as the result of the exercise of his rights under this Agreement.

ARTICLE 1 Term of Agreement

This Agreement shall be effective as of April 1, 1970, except as otherwise specified and shall continue in full force and effect to and including March 31, 1972.

ARTICLE 2 Recognition

The Employer recognizes the Union as the sole and exclusive representative of those employees in the Security Services Unit for the purpose of collective negotiations concerning salaries, wages, hours of work and other terms and conditions of employment. For the purposes of this Agreement, an "employee" or the "employees" are those employees in the following titles pursuant to the certification Case No. C-0002 by the Public Employment

Relations Board dated September 23, 1969 as authorized by Article XIV of the Civil Service Law:

Park Ranger	Institution Safety Officer
Supervising Park Ranger	Institution Safety Supervisor
Forest Ranger	Chief Institution Safety Supervisor
Assistant District Ranger	Traffic and Park Officer
Conservation Officer	Traffic and Park Sergeant
Assistant Regional Conservation Officer	Park Patrolman
Museum Caretaker	Sergeant Park Patrol
Warrant and Transfer Officer	Correction Hospital Officer
Senior Warrant and Transfer Officer	Correction Hospital Senior Officer
Correction Officer	Correction Hospital Charge Officer
Correction Sergeant	Correction Hospital Supervising Officer
Correction Lieutenant	Correction Youth Camp Officer
Building Guard	Correction Youth Camp Assistant Supervisor
Senior Building Guard	Capitol Police Officer
Narcotic Correction Officer	Capitol Police Sergeant
Narcotic Correction Charge Officer	Capitol Police Lieutenant
Narcotic Correction Supervising Officer	
Vault Guard	
Security Officer	
Senior Security Officer	
Chief Security Officer	

ARTICLE 3 No Strike Clause

Section 1. No lock out of employees shall be instituted by the Employer during the term of this Agreement.

Section 2. No strike of any kind shall be instigated, encouraged, condoned or caused by the Union during the term of this Agreement.

ARTICLE 4 Management Rights

Except as expressly limited by other provisions of this Agreement, all of the authority, rights and responsibilities possessed by the Employer are retained by it.

ARTICLE 5 Checkoff

Section 1. The Employer agrees to grant exclusive rights of dues deduction to the Union and will deduct Union membership dues from the pay of those employees who individually request in writing that such deductions be made. The amount to be deducted shall be certified to the Employer by the Union and the aggregate deductions together with a list of employees for whom deductions were made shall be remitted forthwith to the Union.

Section 2. The employee further agrees to grant to the Union exclusive payroll deduction of premiums for employee organization sponsored insurance.

ARTICLE 6 Grievance and Arbitration Procedures

Section 1. For the purposes of this Agreement all disputes shall be subject to the grievance procedure as outlined below:

A. A dispute concerning the application and/or interpretation of this Agreement is subject to all steps of the grievance procedure including arbitration, except those provisions which are specifically excluded.

B. Any other dispute or grievance which may arise between the parties and which is not covered by this Agreement shall be processed up to and including Step 4 of the grievance procedure, except those issues which are reviewable under rules and procedures established by law or those rules and procedures having the force and effect of law.

C. A claim of improper or unjust discipline against an employee shall be processed in accordance with Article 7 of this Agreement.

Section 2. Procedure

Step 1. The employee or the employee and the Union's grievance representative shall present the grievance orally to the employee's immediate supervisor within ten (10) calendar

days after the employee becomes aware of the grievance.

The immediate supervisor shall meet with the parties involved and take all other necessary steps to insure that a proper disposition of the grievance is made.

The supervisor must reply to the Union within forty-eight (48) hours of the presentation of the grievance.

Step 2. In the event the grievance is not resolved in Step 1 hereof, the employee and the Union grievance representative or the Union grievance representative may appeal in writing to the facility or institution head within five (5) calendar days of the receipt of the Step 1 decision. The written grievance shall contain specific references to the section of the Agreement, if any, which the employee or the Union feels has been violated and a description of the grievance. The facility or institution head shall meet with the Union grievance representatives for a review of the grievance within five (5) calendar days of the receipt of the written appeal. A written reply to the employee and the Union shall be submitted within five (5) calendar days following the Step 2 hearing.

Step 3. In the event the grievance has not been satisfactorily resolved in Step 2 hereof, an appeal may be made by the Union in writing to the department or agency head within ten (10) calendar days of the receipt of the Step

2 decision. The department or agency head or his designee shall meet with the Union grievance committee for a review of the grievance within ten (10) calendar days of the receipt of the written appeal and shall issue a written decision within ten (10) calendar days following the meeting.

Step 4. In the event the grievance has not been satisfactorily resolved in Step 3 hereof, written appeal may be made by the Union within fifteen (15) calendar days of the Step 3 decision to the State Director of Employee Relations and shall contain a copy of the Step 3 decision. The State Director of Employee Relations or his designee shall meet with the Union within twenty (20) calendar days of receipt of the request for an appeal of the Step 3 decision. The State Director of Employee Relations or his designee shall issue a decision in writing to the Union within twenty (20) calendar days after the date on which the meeting was held.

Step 5. An appeal from an unsatisfactory decision at Step 4 and a request for arbitration may be brought only by the Union, through the Executive Director or his designee. Arbitration may be resorted to only when a dispute exists regarding the interpretation and/or application of a specific provision of this Agreement.

A. A request for arbitration shall be initiated by the Union's serving upon the Employer

a notice in writing of its intent to proceed to arbitration.

B. Said notice shall identify the provisions of the Agreement, the department, the employee involved, and a copy of the grievance or grievances.

C. Upon receipt of a notice requesting arbitration, the parties jointly shall make application to the Public Employment Relations Board and request that the Public Employment Relations Board submit a list of not less than 9 nor more than 15 but in all cases an odd number of possible arbitrators.

D. The parties shall within five (5) work-days of the receipt of said list meet for the purpose of selecting the arbitrator by alternately striking one name from the list until one name remains. The party having first choice of striking from the list shall be chosen by lot. In the event that the last name on the list is unsatisfactory to either one of the parties, the matter shall be submitted to the American Arbitration Association in accordance with its rules and procedures then applicable to labor arbitrations.

E. The arbitrator shall neither add to, subtract from, nor modify the provisions of this Agreement. He shall confine his decision solely to the application and/or interpretation of this Agreement.

F. The decision or award of the arbitrator shall be final and binding to the extent permitted by and in accordance with applicable law and this Agreement. The arbitrator shall confine himself to the precise issue submitted for arbitration and shall have no authority to determine any other issues not so submitted to him.

G. All fees and expenses of the arbitrator, if required, shall be divided equally between the parties. Each party shall bear the costs of preparing and presenting its own case.

H. The arbitrator shall hold the hearing at a time and place convenient to the parties within twenty (20) calendar days of his acceptance of his selection and shall issue his decision within thirty (30) calendar days of the hearing. The arbitrator shall be bound by the then effective rules of the American Arbitration Association which are applicable to labor arbitrations.

I. In the event a disagreement exists regarding the arbitrability of an issue which the Union wishes to submit to arbitration, the arbitrator shall have the authority to determine whether or not the issue in dispute is arbitrable under the expressed terms of this Agreement. Once a determination that a dispute is arbitrable has been made, the arbitrator shall proceed to determine the merits of the dispute submitted to arbitration.

Section 3. All of the time limits contained in this Article may be extended by mutual agreement.

Section 4. The employee shall be permitted to have an observer of his own choosing present at each step of the grievance procedure up to and including Step 4.

Section 5. All appeals and answers beyond Step 2 of this grievance procedure shall be by registered or certified mail.

Section 6. Grievances resolved at either Step 1, 2 or 3 shall not constitute a precedent unless agreed to by the Director of Employee Relations and the appropriate grievance committee of the Union.

Section 7. The Union shall furnish the Employer with the names and work locations of all Officers, Executive Board members, and grievance representatives and shall notify the Employer of any changes.

Section 8. I. Union grievance representation.

A. The Union grievance representative in Step 1 of the grievance procedure shall be the steward.

B. The Union grievance representatives at Step 2 shall be the steward along with the local unit chairman at the institution or facility or the president of the local or his designee.

C. The grievance committee at Step 3 shall be the steward, the local unit chairman at the institution or facility or the president of the local, the chairman of the Policy Committee, when appropriate, and the Executive Director of the Union, or their designees.

D. The grievance committee at Step 4 shall comprise the steward, the local unit chairman at the institution or facility, or president of the local, the chairman of the Policy Committee, the President of the Union, and the Executive Director of the Union, or their designees.

E. International representatives and Union staff representatives may be present at each step of the grievance procedure.

II. Employer representatives at:

A. Step 1 of the grievance procedure shall be the employee's immediate supervisor.

B. Step 2 of the grievance procedure shall be the institution or facility head or his designee.

C. Step 3 of the grievance procedure shall be the commissioner of the department or agency involved or his designee.

D. Step 4 of the grievance procedure shall be the Director of Employee Relations or his designee.

E. Office of Employee Relations staff may be present at all steps of the grievance procedure.

Section 9. The principals in the grievance procedure may be changed as appropriate to the situation by proper notification to the other party. The steps in the grievance procedure may be changed as appropriate to the situation when agreed to by the parties.

Section 10. A reasonable number of witnesses, when required, shall be allowed to participate in the grievance procedure.

Section 11. An aggrieved employee shall be granted reasonable time to process his grievance in accordance with this Article without loss of pay or leave time.

Section 12. Grievances shall be processed during working hours. Grievance Committee members shall be granted reasonable time to investigate and process grievances during working hours without loss of pay or leave time.

ARTICLE 7

Disciplinary Proceedings and Appeals

X Section 1. The Union shall have the right on behalf of the accused employee to meet and discuss the circumstances of any charges brought under Section 75 of the Civil Service Law with the Employer's representative who has been designated to hear grievances at

Step 3 of the grievance procedure. This meeting shall take place on request of the Union prior to the Section 75 hearing.

Section 2. The hearing officer shall be selected and the hearing conducted in the manner provided for in Section 75 of the Civil Service Law.

Section 3. The employee may designate a representative of the Union, who need not be an attorney, to represent him at the disciplinary hearing.

Section 4. An employee believing himself aggrieved by a penalty of demotion in or dismissal from the service or suspension without pay, or a fine imposed pursuant to Section 75 of the Civil Service Law or the Union and such employee may appeal from such determination to either the State Civil Service Commission or to the courts as provided in Section 76 of the Civil Service Law.

Section 5. In lieu of appeal of Section 4 of this Article, the Union with the employee's approval may appeal to an independent reviewer selected in the same manner as provided in Article 6, Section 2, Step 5 of this Agreement. Such independent reviewer shall exercise the same power and be subject to the same conditions, limitations and standards of review as the State Civil Service Commission and the courts exercise and are subject to in

the review of determinations and disciplinary proceedings. In no event, however, shall such independent reviewer increase any penalty imposed.

Section 6. An employee electing an appeal under Section 5 of this Article shall execute a waiver to his rights of appeal to the Civil Service Commission or to the courts.

ARTICLE 8 **Salaries**

The Employer agrees to provide or where appropriate, prepare, secure introduction and recommend passage by the Legislature of appropriate legislation in order to provide the benefits as agreed to between the parties and described in Appendix A attached to and made a part of this Agreement.

ARTICLE 9 **Retirement**

The Employer agrees to provide or where appropriate, prepare, secure introduction and recommend passage by the Legislature of appropriate legislation in order to provide the benefits as agreed to between the parties and described in Appendix B attached to and made a part of this Agreement.

ARTICLE 10 **Health Insurance**

The Employer agrees to provide or where appropriate, prepare, secure introduction and recommend passage by the Legislature of appropriate legislation in order to provide the benefits as agreed to between the parties and described in Appendix C attached to and made a part of this Agreement.

ARTICLE 11 **Access to Employees and Meeting Space**

Section 1. Department heads may reach understandings with the Union for reasonable and appropriate arrangements whereby the Union may advise employees of the availability of the Union representatives for consultations during non-working hours concerning the Union membership, services and programs.

Section 2. The Union representatives shall, on an exclusive basis for employees covered by this Agreement, have access to employees during working hours to explain the union membership, services and programs under mutually developed arrangements with department heads wherein such access shall not interfere with work duties or work performance. Such consultations shall be no more than fifteen (15) minutes per employee per month,

not to exceed an average of ten (10) percent per month of the employees in the agency or institution.

Section 3. The departments or agencies shall provide meeting space to the Union upon written notice from the president of the local or unit chairman of the Union in buildings owned or leased by the State. Meeting space shall be provided under the following circumstances:

A. Suitable space is not reasonably available elsewhere in the area;

B. The Union agrees to reimburse the Employer for any additional expenses incurred by the Employer including furnishing janitorial services, and any other expense which would not have been incurred had the space not been made available to the Union;

C. That a request for the use of such space is made in advance pursuant to the rules of the department or agency concerned.

ARTICLE 12

Non-discrimination

Section 1. The provisions of the Agreement shall be applied equally to all employees without discrimination as to age, sex, marital status, race, color, creed, national origin, or political affiliation. Both the Employer and the Union shall bear the responsibility for complying with this provision of the Agreement.

Section 2. All references to employees in this Agreement designate both sexes, and wherever the male gender is used it shall be construed to include male and female employees.

Section 3. The Employer agrees not to interfere with the rights of employees to become members of the Union. There shall be no discrimination, interference, restraint, or coercion by the Employer or any Employer representative against any employee because of Union membership or because of any employee activity permissible under the Taylor Law and this Agreement in an official capacity on behalf of the Union, or for any other cause.

Section 4. The Union recognizes its responsibility as bargaining agent and agrees to represent all employees in the bargaining unit without discrimination, interference, restraint, or coercion.

ARTICLE 13

Bulletin Boards

Section 1. The Employer agrees to furnish and maintain suitable bulletin boards in convenient places in each working area to be used exclusively by the Union.

Section 2. The Union agrees to limit its post-

ings of notices and bulletins to such bulletin boards.

Section 3. The Union agrees that it will not post material which may be profane, derogatory to any individual, or constitute election campaign material. All bulletins or notices shall be signed by the Council or local Union president or their designees.

Section 4. Any material which the Employer alleges to be in violation of this Agreement shall be promptly removed by the Union. The matter will then immediately be referred to Step 4 of the grievance procedure for resolution.

Section 5. In institutions or facilities which have repeated violations, the Office of Employee Relations may require advance approval of all future material which is to be posted.

ARTICLE 14 Vacation Credits

Section 1. Pursuant to the Attendance Rules, employees entitled to earn and accumulate vacation credits presently earn and accumulate vacation at the rate of (a) twenty (20) days annually or (b) one-half ($\frac{1}{2}$) day per bi-weekly pay period plus additional vacation in accordance with the following schedule:

Completed Years of Continuous Service

Additional Vacation Credits

1	1 day
2	2 days
3	3 days
4	4 days
5	5 days
6	6 days
7	7 days

27 days

Section 2. In addition to vacation credits to which employees are presently entitled, the Employer agrees to grant employees having 20 or more years of continuous State service and who are entitled to earn and accumulate vacation credits, additional vacation credit as follows:

Completed Years of Continuous Service

Additional Vacation Credits

20 to 24	1 day
25 to 29	2 days
30 to 34	3 days
35 or more	4 days

Section 3. Any such employee who completes 20 years of continuous State service after the effective date of this Agreement shall be credited with additional vacation on that date in accordance with the schedule of additional vacation hereinabove provided and shall thereafter be eligible for additional vacation credit

upon the completion of each additional twelve (12) months of continuous State service. Such employee shall also receive additional vacation credit on the date on which he would normally be credited with additional vacation in accordance with the above schedule and shall thereafter be eligible for additional vacation credit upon the completion of each additional twelve (12) months of continuous State service.

Section 4. Nothing contained herein shall be construed to provide for the granting of additional vacation retroactively for periods of service prior to the effective date of this Agreement.

Section 5. Continuous State service for the purpose of this Article shall mean uninterrupted State service, in pay status, as an employee. A leave of absence without pay, or a resignation followed by reinstatement or reemployment in State service within one year following such resignation, shall not constitute an interruption of continuous State service for the purposes of this Article, provided, however, that leave without pay for more than six (6) months or a period of more than six (6) months between resignation and reinstatement or reappointment, during which the employee is not in State service, shall not be counted in determining eligibility for additional vacation credits under this Article.

Section 6. Vacation credits may be accumulated up to a maximum of forty (40) days; provided, however, that in the event of death, retirement, or separation of service, employees shall be compensated in cash for accrued and unused vacation credits only up to a maximum of thirty (30) days.

ARTICLE 15

Personal Leave

Section 1. The Employer shall not require an employee to give a reason as a condition for approving the use of personal leave credits; provided, however, that prior approval for the requested leave must be obtained, that the resulting absence will not interfere with the proper conduct of governmental functions, and that an employee who has exhausted his personal leave credits shall charge approved absences from work necessitated by personal business or religious observance to accumulated vacation or other credits, excluding sick leave.

Section 2. Personal leave shall not be carried over from year to year.

Section 3. Personal leave may be used in conjunction with an employee's vacation, and shall be subject to the same conditions as govern vacation.

ARTICLE 16

Bereavement Leave

Section 1. Employees shall be allowed to charge absences from work in the event of death or illness in the employee's immediate family against accrued sick leave credits up to a maximum of fifteen (15) days in any one calendar year.

Section 2. Immediate family shall be defined as any relative or relative in-law or any person with whom an employee has been making his home.

Section 3. Requests for bereavement leave shall be subject to approval of the appointing authority; such approval shall not be unreasonably denied.

ARTICLE 17

Sick Leave Accumulation

Maximum sick leave credits for employees shall be increased from 150 days to 165 days.

ARTICLE 18

Leave—Probationary Employees

Every permanent employee holding a position in the competitive class and appointed to a State position from an open competitive eligi-

ble list shall be granted a leave of absence from his position for the duration of his probationary term, or for twenty-six (26) weeks, whichever is less.

ARTICLE 19

Safety Standards

The Employer agrees that, when appropriate, it will endeavor to provide safety standards for the protection of employee well-being commensurate with those presently in effect in the private sector. Grievances hereunder may be processed only in accordance with Article 6, Section 1B.

ARTICLE 20

Liability Coverage

The Employer as a self-insurer agrees to provide adequate liability coverage for conservation officers and forest rangers who use their homes in the performance of their official duty.

ARTICLE 21

Seniority

Section 1. For the purposes of this Article, seniority shall be defined as the length of an

employee's uninterrupted service in title in a department or agency including sick leave, military leaves not to exceed four (4) years and other leaves of absence which do not exceed one (1) year and Workmen's Compensation leave.

Section 2. Seniority shall be the basis by which employees shall select vacations and pass days.

Section 3. The Employer shall have the right to make any job or shift assignment necessary to maintain the services of the department involved. However, job assignments and shift selection shall be made in accordance with seniority provided the employee has the ability to properly perform the work involved. Grievances arising under this section shall be processed up to Step 4 of the grievance procedure but not to arbitration.

Section 4. The Employer shall post all permanent vacancies in shifts or job assignments for a period of thirty (30) days for purposes of bidding on vacancies before making a permanent assignment.

Section 5. An employee shall not have the right to bump for any reason.

Section 6. The shift and pass day provisions of this Article shall not apply to those departments whose employees function on a rotating shift basis.

Section 7. Nothing contained in Section 2 of this Article shall prevent mutually agreed to local arrangements regarding the method that vacations or pass days are to be selected.

Section 8. The Employer agrees to provide the Union a list of its employees by department and seniority and to update it quarterly.

ARTICLE 22

Disciplinary Transfers

Shift, pass day, job assignment, transfer or reassignment to another institution or station shall not be made for the purpose of imposing discipline.

ARTICLE 23

Overtime

Section 1. Overtime work shall be offered to employees on the basis of seniority and shall be equitably distributed among employees who normally perform such work. Each employee shall be selected in turn according to his place on the seniority list by rotation; provided, however, that the employee whose turn it is to work possesses the qualifications and ability to perform the work required.

Section 2. An employee requesting to be skipped when it becomes his turn to work over-

time shall not be rescheduled for overtime work until his name is reached again in orderly sequence and an appropriate notation shall be made in the overtime roster.

Section 3. In the event no employee wishes to perform the required overtime work, the Employer shall by inverse order of this overtime list assign the necessary employees required to perform the work in question.

Section 4. The Union recognizes that work in progress shall be completed by the employee performing the work at the time the determination was made that overtime was necessary.

Section 5. An overtime roster shall be available for inspection by representatives of the Union at each institution or facility.

Section 6. Time during which an employee is excused from work because of vacation, holidays, personal leave, sick leave at full pay, compensatory time off or other leave at full pay shall be considered as time worked for the purpose of computing overtime.

Section 7. Training programs conducted during other than regular working hours shall be scheduled for a minimum two-hour period.

Section 8. Nothing contained herein shall form a basis for any claim for wages or overtime premiums for hours not worked.

Section 9. The State shall provide premium pay for conservation officers, assistant regional conservation officers, forest rangers, and assistant district rangers at the rate of five (5) percent of their basic annual compensation in lieu of overtime compensation.

Section 10. In the event the State develops and installs an effective method by which worked overtime can be recorded the guaranteed premium shall be withdrawn and the employees shall be compensated for their overtime on the same basis as other employees in the Security Services Unit.

ARTICLE 24

Recall

An employee who is recalled to work unscheduled overtime after having completed his scheduled work period and left his scheduled work station shall be guaranteed a minimum of one-half day's overtime compensation. Employees called back as a result of a riot, prison break, fire or escape and not put to work shall be guaranteed one-quarter day's overtime compensation.

ARTICLE 25

Shift Changes

Section 1. No employee shall have his shift schedule changed for the purposes of avoiding

the payment of overtime, unless he has been notified of such change one (1) week in advance of the time in which the changed work period is to begin; provided, however, that the circumstances necessitating such change are foreseeable prior to such one-week period.

Section 2. In the event that circumstances necessitating such shift changes are not foreseeable, then such notice shall be given as soon as possible. However, under no circumstances shall changes in shift be made less than forty-eight (48) hours prior to the starting time of the changed shift which the employee is directed to work.

Section 3. In the event such notice of shift change is not given within forty-eight (48) hours, no employee shall be deprived of the opportunity to work his normal shift and to be paid overtime for the hours worked in excess of forty (40) hours in the workweek.

Section 4. Employees who compete in New York State Civil Service examinations and whose shift ends less than eight (8) hours before the starting time of such an examination shall not be required to work that shift and such absence shall not be charged to accrued leave credits.

Section 5. Regularly scheduled days off shall not be changed for the purpose of avoiding the payment of overtime.

ARTICLE 26 Holiday Pay

Section 1. An employee who is entitled to time off with pay on days observed as holidays by the State as an Employer shall be allowed compensatory time off whenever any such day falls on the employee's pass day.

Section 2. Any employee who is entitled to time off with pay on days observed as holidays by the State who is scheduled or required to work on a holiday shall receive at his option either (a) additional compensation for each holiday worked at the rate of 1/10 of his bi-weekly rate of compensation or (b) a compensatory day off in lieu of such holiday worked. Compensation for less than a full day of holiday work will be prorated, and will include geographic, location, inconvenience and shift pay as may be appropriate to the place or hours worked.

Section 3. An employee selecting an additional day off in lieu of holiday pay shall notify the payroll agency in writing of his intention to do so with the understanding that such notice constitutes a waiver of his right under this Agreement to receive cash compensation for holidays worked.

Section 4. Such waiver shall be executed by May 15, 1970, and shall remain in full force and effect for a period of one (1) year. The

employee may after April 1, 1971, but before May 15, 1971, elect to revoke his waiver by notifying the Employer in writing of his intention. In the event no revocation notice is received by the Employer, the original notice of waiver shall continue to remain in full force and effect until the expiration date of this Agreement.

Section 5. For the purposes of this Article, the Employer shall be deemed to be the payroll agency.

Section 6. As used in this Agreement, the term holiday shall mean: New Year's Day, Lincoln's Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Election Day, Veterans' Day, Thanksgiving Day, Christmas, or a day designated by the State to be observed as a holiday in lieu of such holiday and any other day designated as a holiday for State employees by the Governor as an Employer.

ARTICLE 27

Alternate Examination Dates

In the event an employee in this unit is unable to participate in an examination because of the death, within seven (7) days immediately preceding the scheduled date of an examination, of an employee's grandparent,

parent, spouse, brother, sister, child, or a relative living in the employee's household, such employee shall be given an opportunity to take such examination at a later date, but in no event shall such examination be scheduled sooner than two (2) days following the date of burial. The Department of Civil Service shall prescribe appropriate procedures for reporting the death and applying for the examination. Appropriate arrangements shall be made in circumstances where there is a protracted period between the death and the burial.

ARTICLE 28

Review of Personal History Folder

Section 1. An employee shall, within fifteen (15) days of a written request to his agency or department, have an opportunity to review his personal history folder in the presence of an appropriate official of the department or agency. He shall be allowed to place in such file a response of reasonable length to anything contained therein which such employee deems to be adverse.

Section 2. The personal history folder shall contain all memoranda or documents relating to such employee which contain criticism, commendation, appraisal or rating of such employee's performance on his job. Copies of

such memoranda or documents shall be sent to such employee simultaneously with their being placed in his personal history folder. An employee may at any time request and be provided copies of all documents and notations in his personal folder.

ARTICLE 29 **Labor Management Committees**

The parties agree that labor management committees shall be established on a Security Services Unit basis as well as departmental, institutional or facility basis. The function of these committees shall include discussion of:

1. The application and administration of present and future education and training programs that will enable employees to acquire knowledge and skills required for advancing in career development programs on departmental, institutional or facility level.

2. Safety and health standards as well as all other items involving terms or conditions of employment not covered by this Agreement, including departmental and institutional rules affecting terms and conditions of employment.

ARTICLE 30 **Absence—Extraordinary Circumstances**

An employee who has reported for duty and, because of extraordinary circumstances beyond

his control other than those related to weather conditions, is directed to leave work, shall not be required to charge such directed absence during such day against leave credits.

ARTICLE 31 **Travel Allowances**

Section 1. Per Diem Meal and Lodging Expenses.

The Employer agrees to reimburse, on a per diem basis as established by rules and regulations of the Comptroller, employees who are eligible for travel expenses, for their actual and necessary expenses incurred while in travel status in the performance of their official duties for hotel lodging, meals and incidental expenses related thereto (hotel tips, etc.) for a full day at rates stated in the following schedule:

A. In the City of New York and the Counties of Nassau, Suffolk, Rockland and Westchester, not to exceed \$24.00 except as specified by the Comptroller in accordance with law.

B. In places elsewhere within the State of New York, not to exceed \$19.00 except as specified by the Comptroller in accordance with law.

C. In places outside of the State of New York, at least \$20.00 except as specified by the Comptroller in accordance with law.

Section 2. Mileage Allowance.

The Employer agrees to provide, subject to rules and regulations of the Comptroller, a maximum mileage allowance rate for the use of personal vehicles for those persons eligible for such allowance in connection with official travel, as follows:

A. Effective October 1, 1970, the maximum mileage allowance rate will be 10½ cents per mile.

B. Effective April 1, 1971, the maximum mileage allowance rate will be 11 cents per mile.

ARTICLE 32

Workmen's Compensation Leave

Section 1. An employee necessarily absent from duty because of occupational injury or disease as defined in the Workmen's Compensation Law who is allowed leave from his position for the period of his absence necessitated by such injury or disease, up to cumulatively one (1) year including any periods of such absence during which the employee draws vacation, sick leave or other leave credits, shall be (a) granted compensation leave with pay without charge to leave credits not exceeding cumulatively six (6) months and/or (b) allowed to draw accrued leave credits, and (c) upon exhausting leave with full pay benefits

under (a) and (b), granted sick leave at half pay for which he may be eligible during such leave unless (1) there is good and sufficient reason to believe that the disability resulting from such injury or disease is not job-related or is primarily due to some pre-existing medical condition; (2) there is good and sufficient reason to believe that the employee could report for work on a full-time or part-time basis; (3) the employee's services would have been terminated or would have ceased under law; (4) the employee's claim for benefits is controverted by the State Insurance Fund.

Section 2. An employee who draws leave credits as provided in Section 1 shall be entitled to restoration of such credits, including those used for absences of less than a full day, as are used during a period of absence for which an award of compensation has been made and credited to the Employer as reimbursement for wages paid. An employee who is necessarily absent from duty as described hereinabove may be granted compensation leave with pay without charge against leave credits for absences of less than a full day where such employee returns to work on a part-time basis. An employee not eligible for restoration of leave credits as provided hereinabove for the sole reason that he was not on leave for more than fourteen (14) days shall have such leave credits as are used during such fourteen (14) day period restored in full.

Section 3. The Employer and the Union shall conduct a joint study of the application of Workmen's Compensation leave to employees injured in the line of duty while engaged in police-type activities.

Section 4. The Employer agrees that an employee eligible for Workmen's Compensation leave because of occupational injury or disease as defined in the Workmen's Compensation Law, when absent from work for the purpose of attending a hearing scheduled by the Workmen's Compensation Board in connection with such injury or disease shall be granted Compensation leave with pay without charge to leave credits for such absence; provided, however, that the cumulative total of Compensation leave with pay not charged to leave credits granted for attendance at Workmen's Compensation Board hearings or for absences necessitated by the occupational injury or disease shall not exceed six (6) months.

ARTICLE 33

Reimbursement for Property Damage

Section 1. The Employer agrees to provide for the uniform administration of the procedure for reimbursement to employees for personal property damage or destruction as provided for by subdivision 12 of Section 8 of the State Finance Law.

Section 2. The Employer and the Union shall bilaterally agree on the provisions for such administration, and the Comptroller shall draft and promulgate rules and regulations consistent therewith. Such regulations shall include uniform guidelines for administration including procedures for filing and recording of claims, required evidence and documentation, approval by the institution head with an appeal to the head of the department, schedule of payments with authority in the Comptroller to adjust such amounts as circumstances warrant.

Section 3. Allowances shall be based upon the reasonable value of the property involved and payment shall be made against a release. Payments of \$25 or less shall be made out of local funds at the institution level.

ARTICLE 34

Employee Organization Leave

Section 1. Union delegates shall be granted employee organization leave for one (1) state-wide convention per year and one (1) A.F.S.-C.M.E. national convention every two (2) years, and one (1) state AFL-CIO convention per year.

Section 2. Members of the Union Executive Board shall be granted employee organization leave for four (4) meetings per year.

Section 3. Members of each of the Correction, Narcotic, Safety, Parkway and Conservation Policy Committees shall be granted employee organization leave for two (2) meetings in each year of this Agreement.

Section 4. Under special circumstances and upon advance request, additional employee organization leave for additional meetings may be granted by the Director of Employee Relations.

Section 5. For the purpose of negotiation of an agreement to succeed this Agreement, a reasonable number of employees serving on the Union negotiating team shall be granted employee organization leave including reasonable time for preparation and travel.

Section 6. Employee organization leave, as hereinabove provided, shall be granted subject to the provision that the resulting absence from work will not interfere with the proper conduct of governmental functions.

Section 7. Travel time, as used in this Article, shall mean actual and necessary travel time, not to exceed four (4) hours each way.

ARTICLE 35

Jury Duty

Section 1. When an employee submits proof of the necessity of jury service or appearance

as a witness pursuant to subpoena or other order of a court or body, an employee shall be granted a leave of absence with pay with no charge against leave credits.

Section 2. In the event the employee is required to appear in court or before a body as a party to any private legal action which is not job-related, the provisions of this Article shall not apply.

ARTICLE 36

Credit Union Deduction

The Employer agrees to deduct from the salary of an employee an amount authorized in writing by the employee which shall be within the minimum and maximum amounts specified by the Comptroller and to transmit such funds to a bona fide credit union. The sums transmitted shall be used for appropriate purposes and their specific allocation shall be determined by an arrangement between the employee and his credit union. The authorization for such deductions may be withdrawn by an employee at any time upon filing of a written notice of such withdrawal with the State Comptroller. The deductions shall be in accordance with reasonable rules and regulations of the Comptroller not inconsistent with law which may be necessary for the exercise of this authority under this section.

ARTICLE 37

Uniforms

Section 1. When the Employer requires an employee to wear a uniform, he shall be furnished by the Employer with a uniform, or replacement of such part of such uniform as may reasonably be necessary. This section shall become effective on September 30, 1970, if feasible, and, in any event, on December 1, 1970. An appointing authority may make this section effective in such stages and in such manner prior to September 30 or December 1, 1970 as it may deem appropriate. Where a uniform or replacement item is provided in lieu of a uniform allowance, such uniform or replacement shall consist only of those items which were covered by the uniform allowance.

Section 2. Uniform allowances for employees shall be terminated effective April 1, 1970, except that if an employee is entitled to a uniform allowance payment as of April 1970 and has not heretofore received such payment, he shall receive such payment.

Section 3. The Employer shall continue its policies to clean or maintain uniforms or to provide allowances for cleaning or maintaining uniforms of employees where such policies were in effect on March 31, 1970. A joint Labor-Management Committee shall study the question of extending such service or allowance

to employees not entitled thereto under the Employer's present policies.

ARTICLE 38

Payroll Computation

Section 1. The Employer shall effective April 1, 1970 or as soon thereafter as technically possible calculate employees' salary payments on an appropriate ten (10) working-day basis rather than on a fourteen (14) calendar-day basis.

Section 2. The Employer agrees that paychecks issued to employees will be dated and delivered no later than the Thursday following the end of the payroll period.

ARTICLE 39

Agency Shop

In the event that legislation is enacted which permits public employers and employee organizations to enter into collective negotiations agreements providing for employee organization security of a type commonly known as "agency shop" or in the event the New York Court of Appeals removes the legal impediments to such form of employee organization security and in the event a substantially sized political subdivision of New York State enters into such an agreement, then the Union shall

have the right prior to June 1, 1971, to reopen contract negotiations with the Employer solely to seek establishment of an agency shop provision permissible in accordance with law. All other provisions of this Agreement will remain in full force and effect during and succeeding the course of any such reopened contract negotiations.

ARTICLE 40 **Membership Packets**

The Employer agrees to provide each new employee in the Security Services Unit with a membership packet furnished by the Union within one workweek following his first day of work. The materials which may be included in such packet shall be subject to the restrictions set forth in Article 13, Sections 3 and 4.

ARTICLE 41 **Preservation of Benefits**

With respect to matters not covered by this Agreement, the Employer will not seek to diminish or impair during the term of this Agreement any benefit or privilege provided by law, rule or regulation for employees without prior notice to the Union and when appropriate, without negotiations with the Union provided, however, that this Agreement shall

be construed consistent with the free exercise of rights reserved to the Employer by the Management Rights Clause of this Agreement.

ARTICLE 42 **Savings Clause**

Should any article, section or portion thereof of this Agreement be held unlawful and unenforceable by any court of competent jurisdiction or shall have the effect of loss to the State of funds made available through Federal law, such decision shall apply only to the specific article, section or portion thereof directly specified in the decision; upon the issuance of such a decision the parties agree immediately to negotiate a substitute for such article, section or portion thereof.

ARTICLE 43 **Printing of Agreement**

The Employer shall be responsible for reproducing this Agreement and will furnish a sufficient number of copies to the Union for distribution to employees in the Security Services Unit.

ARTICLE 44
APPROVAL OF THE LEGISLATURE

IT IS AGREED BY AND BETWEEN THE PARTIES THAT ANY PROVISION OF THIS AGREEMENT REQUIRING LEGISLATIVE ACTION TO PERMIT ITS IMPLEMENTATION BY AMENDMENT OF LAW OR BY PROVIDING THE ADDITIONAL FUNDS THEREFOR, SHALL NOT BECOME EFFECTIVE UNTIL THE APPROPRIATE LEGISLATIVE BODY HAS GIVEN APPROVAL.

ARTICLE 45
Conclusion of Collective Negotiations

Section 1. The Employer and the Union agree that this Agreement is the entire agreement, terminates all prior agreements or understandings and concludes all collective negotiations during its term. Neither party will during the term of this Agreement seek to unilaterally modify its terms through legislation or other means which may be available to them.

Section 2. The parties acknowledge that, except as otherwise expressly provided herein,

they have fully negotiated with respect to the terms and conditions of employment and have settled them for the term of this Agreement in accordance with the provisions thereof.

Section 3. The Employer and the Union agree to support jointly any legislation or administrative action necessary to implement the provisions of this Agreement.

ARTICLE 46
Unchallenged Representation

The Employer and the Union agree pursuant to Section 208 of the Civil Service Law that the Union shall have unchallenged representation status for the maximum period permitted by law on the date of execution of this Agreement.

IN WITNESS THEREOF, the parties hereto have caused this agreement to be signed by their respective representatives

STATE OF NEW YORK

Abe Lavine
Director of Employee Relations

SECURITY UNIT EMPLOYEES COUNCIL
82, AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES,
AFL-CIO

William Ciuros, Jr.
President, Council 82

Cornelius O'Sullivan
Executive Vice President, Council 82

Warren Cairo
Secretary, Council 82

William Clay
Treasurer, Council 82

Carl Gray
Executive Director, Council 82

Hollis V. Chase, Member
Negotiating Team—Local 1040

Kenneth Stroh, Member
Negotiating Team—Local 1040

Thomas Thompson, Member
Negotiating Team—Local 1041

John J. Bute, Member
Negotiating Team—Local 1151

Raymond A. Cornelison, Member
Negotiating Team—Local 1264

Robert Graham, Member
Negotiating Team—Local 1264

Vincent Diglio, Member
Negotiating Team—Local 1790

Whitfield Todd, Member
Negotiating Team—Local 1790

Charlton S. Burse, Member
Negotiating Team—Local 1791

Gus Charos, Member
Negotiating Team—Local 1791

John O'Donnell, Member
Negotiating Team—Local 1792

Charles Severance, Member
Negotiating Team—Local 1872

Gerald A. Austin, Member
Negotiating Team—Local 1873

Angelo J. Orlandi, Member
Negotiating Team—Local 1874

Thomas C. Francisco, Member
Negotiating Team—Local 1875

P. J. Ciampa
International Field Staff Director
AFSCME, AFL-CIO

APPENDIX A Salaries

Section 1. The Employer shall prepare, secure introduction and recommend passage by the Legislature of appropriate legislation in order to provide benefits described in this Appendix A.

Section 2. General Salary Increase.

A. Effective April 1, 1970, the basic annual salary of employees in full-time employment status as of March 31, 1970, will be increased by 7½ percent or \$750 whichever is greater, provided, however, that \$250 of such increase will not be effective until October 1, 1970.

B. Effective April 1, 1971, the basic annual salary of employees in full-time employment status as of March 31, 1971, will be increased by 6 percent or \$525, whichever is greater.

C. The above provisions shall apply on a pro-rated basis to employees paid on an hourly or per diem basis or on any basis other than at an annual salary rate, or to an employee serving on a part-time basis.

Section 3. Extension of Prior Minimum Salary Increases.

A. Effective April 1, 1970, the \$600 minimum increases effective on April 1, 1968 and April 1, 1969 will be extended to employees hired on April 1, 1969 or later and in employment status on March 31, 1970 in substantially the same manner as provided in Section 11 of Chapter 333 of the Laws of 1969.

B. Effective April 1, 1971, such \$600 minimum increases will be extended to employees hired on April 1, 1970 or later and in employment status on March 31, 1971 in substantially the same manner as provided in Section 11 of Chapter 333 of the Laws of 1969.

Section 4. Minimum Annual Salary.

A. Effective April 1, 1970, the minimum annual salary provided by Section 16 of Chapter 333 of the Laws of 1969 of \$4,900 in up-state New York and \$5,200 in the New York Metropolitan Area (New York City, Nassau, Rockland, Suffolk and Westchester Counties) will be extended to an employee hired on April 1, 1969 or later and in full-time employment status as of March 31, 1970. The general salary increase effective April 1, 1970 will be applied to the resulting annual salary of such an employee.

B. Effective April 1, 1971, such an employee shall receive the greater of the following:

Either (a) the minimum annual salary indicated above plus the 1970 and 1971 general salary increases, or (b) the salary which he would otherwise be entitled to receive on April 1, 1971 if a minimum annual salary had not been enacted, plus the 1971 general salary increase. In computing the salary which such employee would otherwise be entitled to receive on April 1, 1971 if a minimum annual salary had not been enacted, no annual increment or part of an increment for which the employee is otherwise eligible on April 1, 1971 shall be included that would increase such salary to an amount in excess of the

second longevity step of the grade of his position.

C. Effective April 1, 1971, the minimum annual salary provided by Section 16 of Chapter 333 of the Laws of 1969 will be applied to each employee hired on April 1, 1970 or later and in full time employment status as of March 31, 1971 and the 1971 general salary increase will be applied to the resulting annual salary of such employee.

D. Each employee who shall have been in fulltime employment status as of March 31, 1971, and who is, on or after April 1, 1971, in full-time employment status and has 26 bi-weekly payroll periods of State service in full-pay status during the term of this Agreement, shall receive, in lieu of any salary otherwise payable, an annual salary of not less than \$6,000. All other applicable salary increases and compensation to which an employee may be entitled, exclusive of shift and inconvenience pay, will be considered in determining the amount of the adjustment, if any, necessary to provide an annual salary of \$6,000.

Section 5. Full Minimum Salary Increase Upon Promotion.

On and after April 1, 1970, the annual salary of a full-time employee holding a position to which he is or was appointed or promoted from a lower grade position shall not be less than the annual salary he would be receiving

in such position had he first entered State service by open competitive appointment to such position on the date of his appointment or promotion to such position.

Section 6. Extension of Prior Minimum Salary Increases to Employees in Unallocated Positions Who Are Subsequently Transferred to Allocated Positions.

On and after April 1, 1970, an employee who is or was appointed to and is holding a position allocated under Section 130 of the Civil Service Law in which he is entitled under Section 131 (5) of the Civil Service Law to the minimum salary plus increment credit for 1 or more years of service in an unallocated position previously held by him, will receive the salary in the allocated position which he would be receiving had such years of service actually been rendered in the allocated position.

Section 7. Locational Compensation.

Effective April 1, 1970, an employee whose principal place of employment or, in the case of a field employee, whose official station as determined in accordance with the regulations of the Comptroller, is located in Monroe County will receive locational compensation of \$200, on the same terms and in the same amount as employees in the New York Metropolitan Area.

Section 8. Salary Schedule and Elimination of First Salary Step.

A. Effective April 1, 1970, the rates of compensation set forth in the schedule provided by Section 130 of the Civil Service Law in effect on March 31, 1970, will be increased by 7½ percent less \$250. Effective October 1, 1970, such rates of compensation will be increased by \$250. Effective April 1, 1971, such rates of compensation in effect on October 1, 1970 will be increased by 6 percent.

B. Effective April 1, 1971, the first salary rate of each salary grade for employees will be eliminated. The elimination of such first step shall not operate to increase the basic annual salary of any employee who would otherwise be entitled to a rate of compensation equal to or in excess of the second year rate of compensation of the grade of his position if the first year salary rate were not eliminated.

APPENDIX B Retirement

Section 1. The Employer shall prepare, secure introduction and recommend passage by the Legislature of appropriate legislation in order to provide effective April 1, 1970, the matters described in the sections of this Appendix B with the exception of Section 6.

Section 2. Improved Retirement Benefit.

A. The eligibility requirement for coverage of employees under the Career Retirement Plan

for State Employees ("Career Retirement Plan") will be reduced from 25 years to 20 years. Those eligible for the Career Retirement Plan will receive a benefit of 1/50 of final average salary for each year of credited service. The maximum annual pension will not exceed three-quarters of final average salary, provided, however, that employees in the State Employees' Retirement System ("Employees' Retirement System") or the State Policemen's and Firemen's Retirement System ("Policemen's and Firemen's Retirement System") on March 31, 1970 who at the time of their retirement would have received a greater pension under the Career Retirement Plan as originally enacted had it remained in force will receive such greater pension. (The annuity based on the employee's own contributions toward retirement is not subject to such limitation.)

B. The Career Retirement Plan as provided by this Section will be made permanent.

C. Employees covered by the special retirement plans for uniformed correction officers or members of the regional State park police as provided by Sections 89, 383 or 383-a of the Retirement and Social Security Law will be given the option of transferring to the Career Retirement Plan on or before March 31, 1971.

D. The vested retirement benefit for employees will be computed under the same formula

as the service retirement benefit for the Career Retirement Plan. (Accordingly, employees who vest with less than 20 years of service will have their benefit computed under the 1/60 formula; those who vest with 20 or more years of service will have their benefit computed under the 1/50 formula.)

E. The additional pension provided under Paragraph A of this Section will not be included in the ordinary death benefit.

Section 3. Sick Leave Credits.

A. At retirement for superannuation an employee who is a member of the Employees' or Policemen's and Firemen's Retirement System will be granted additional retirement service credit, on a day-for-day calendar day basis, equal to the amount of accumulated unused sick leave credits, up to a maximum of 165 days. (No payment will be made for sick leave nor will the value of sick leave be part of final average salary.)

B. This provision applies only to those who are subject to a plan established by law, rule, regulation, written order or written policy which provides for the regular earning and accumulation of sick leave.

Section 4. Survivor's Benefit for Retired Employees.

The survivor's benefit for retired employees administered by the Department of Civil Serv-

ice will be increased from \$2,000 to \$3,000 for employees who retire on or after April 1, 1970.

Section 5. Military Credit.

An employee who is a member of the Employees' or Policemen's and Firemen's Retirement System in the employ of the State as of March 31, 1970, and who was eligible to obtain credit for military service pursuant to Section 243 of the Military Law but did not make a timely election, may obtain credit for such service by depositing in the Employees' or Policemen's and Firemen's Retirement System respectively an amount equal to the contributions he would have made had he made a timely election, plus all interest to date. Such deposit must be made on or before March 31, 1971, provided, however, such a member may elect to deposit such funds over a period of time if the initial contribution is made on or before March 31, 1971 and the period of payment does not exceed the period of credit being claimed. If partial payment is made, the amount of credit will be prorated.

Section 6. Joint Employer-Union Committee and Reopener.

A joint Employer-Union Committee will be established for further study and consideration of retirement benefits for employees. Such study will be completed by December 1, 1970. The Union shall have the right on December 1, 1970 to reopen negotiations with the Em-

ployer to seek to amend this Agreement effective no earlier than April 1, 1971 solely with respect to retirement benefits for employees and for no other purpose. All other provisions of this Agreement will remain in full force and effect during the course of any such reopened negotiations.

Section 7. Reopen Transfer Opportunity.

Employees who are members of the Employees' or Policemen's and Firemen's Retirement System in the employ of the State on March 31, 1970 and who formerly were members of another retirement system in the State and failed to transfer service credit from such system within the prescribed period of time will be granted an opportunity to obtain credit for such previous service. Such a member may obtain such credit by depositing in the Employees' or Policemen's and Firemen's Retirement System respectively an amount equal to the contributions withdrawn from his former system, plus all interest to date. Such deposit must be made on or before March 31, 1971, provided, however, such a member may elect to deposit such funds over a period of time if the initial contribution is made on or before March 31, 1971 and the period of payment does not exceed the period of credit being claimed. If partial payment is made, the amount of credit will be prorated.

Section 8. Special Interest.

Effective April 1, 1970, employees who are members of the Employees' or Policemen's and Firemen's Retirement System will receive interest on their contributions credited at a rate equal to the rate of earnings of the retirement systems, in the same manner as prescribed under the existing special interest program, up to a maximum of 5 percent.

Section 9. World War II Credit.

A. An employee who is a member of the Employees' or Policemen's and Firemen's Retirement System who (a) served as a member of the armed forces of the United States during World War II (July 1, 1940 to December 31, 1946), (b) was a resident of New York State at the time of his entry into such service, (c) was honorably discharged, and (d) is not receiving a military pension (other than for disability) for such service may claim retirement credit for up to three (3) years of such service. To obtain such credit the member must (a) deposit in the respective annuity savings fund a sum equal to the product of the member's normal rate of contribution at time of entry into State service, his annual rate of salary at that time and the period of such military service being claimed, with all interest to date, and (b) deposit in the respective pension accumulation fund a sum equal to the product of the State's normal contribution rate

at the time of the member's entry into State service, his annual rate of salary at such time and the period of such military service being claimed, with all interest to date. Such deposit must be made on or before March 31, 1971, provided, however, such a member may elect to deposit such funds over a period of time if the initial contribution is made on or before March 31, 1971 and the period of payment does not exceed the period of credit being claimed. If partial payment is made, the amount of credit will be prorated.

B. Those who enter State service on or after April 1, 1970 will have one (1) year from their date of entry to make application and payment for such service in the manner specified above. The salary base for such an employee will be his annual salary at the time of his entry into State service. The amount of the contributions to the Employees' or Policemen's and Firemen's Retirement System in the case of an employee who reenters State service on or after April 1, 1970 will be based on (a) his salary at the time of original entry into State service or (b) his salary upon reentry into State service, whichever results in the greater contributions.

C. An employee who purchases military credit pursuant to this provision will not be credited with such service if at the time of retirement (a) he is receiving a military pen-

sion (other than for disability) for the period of service being claimed, or (b) he is retiring from service with less than 10 years of total service credit or with less than 3 years of member service rendered subsequent to the date of last entry into State service; upon retirement such an employee will have such of his contributions for service retirement returned with interest.

Section 10. Guaranteed Death Benefit.

A death benefit will be payable on behalf of the employee equal to three times the employee's annual salary, raised to the next multiple of \$1,000, for those employees with ninety (90) or more days of service, in lieu of the death benefits now provided under Sections 60 or 360 of the Retirement and Social Security Law, and Section 154 of the Civil Service Law.

Section 11. Temporary Retirement Benefits.

Temporary retirement benefits available to employees who are members of the Employees' Retirement System will be continued to March 31, 1972.

APPENDIX C Health Insurance

Section 1. The Employer agrees to provide for employees covered by the State Health Insurance Plan that, effective April 1, 1970:

A. The maternity indemnity for hospital coverage be increased from \$150 to \$200.

B. Full payment up to a limit of \$25 be provided for independent professional ambulance service when the patient is admitted as an in-patient in a hospital.

C. Hospital charges for the administration of radiation therapy in the out-patient department of a hospital be covered in full.

D. The number of days of hospital care for pulmonary tuberculosis be increased from 30 to 120 days.

Section 2. The Employer shall prepare, secure introduction and recommend passage by the Legislature of appropriate legislation in order to provide that, effective April 1, 1971:

A. The Employer increase its contribution for the cost of health insurance for dependents of employees from 50 to 75 percent of the cost for dependent coverage under the State-wide Plan.

B. The Employer provide a sum not to exceed \$250,000 to obtain a non-contributory plan covering major dental expenses for employees and their dependents. The parties shall negotiate the details of such a plan.



STATE OF NEW YORK
DEPARTMENT OF CORRECTIONAL SERVICES
THE STATE OFFICE BUILDING CAMPUS
ALBANY, N. Y. 12226

BENJAMIN WARD
COMMISSIONER

LEWIS L. DOUGLASS
EXECUTIVE
DEPUTY COMMISSIONER

108 a

MEMORANDUM

TO: All Superintendents of Correctional Facilities and
Camp, Area Offices, Central Office Group and
Division Heads

FROM: Lewis L. Douglass, Executive Deputy Commissioner

DATE: October 26, 1976

This is to inform you that effective immediately that all sex certification for the transfer and reassignment of correction officers is being eliminated.

The Personnel Bureau will immediately interfile all transfer requests in seniority order making a combined list for each facility of male and female officers requesting transfer.

All officers, regardless of sex, will be permitted to bid pursuant to Article 25 of the New York State Agreement with Council 82 of AFSCME.

Personnel will also request that all preferred lists and open-competitive lists be established for appointment as correction officers including candidates of both sexes.

pcm

cc: Mr. Bankhead - Personnel
Mr. Burns - Labor Relations

Handwritten: Exhibit B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IOLA FORTS et. al.,

Plaintiffs,

- against -

BENJAMIN WARD et. al.,

Defendants.

:
:
:
:
:
:
:

77 Civ. 1560

Judge Owen

MEMORANDUM OF LAW IN
OPPOSITION TO MOTION
FOR PRELIMINARY INJUNCTION
SUBMITTED BY DEFENDANTS
SECURITY UNIT EMPLOYEES
COUNCIL 82, GRAY, DEFAYETTE,
LOCAL 1265 and YARELL

PRELIMINARY STATEMENT

This is an action brought by women inmates at Bedford Hills Correctional Facility pursuant to 42 U.S.C. § 1983 to enjoin prohibit and restrain the assignment of male correction officers to the housing units at the Bedford Hills facility.

The instant motion is brought pursuant to FRCP Rule 65 seeking to enjoin the assignment of the male officers to the housing units pendente lite.

Plaintiffs are women inmates at the Bedford Hills Correctional Facility, a prison for women inmates. Plaintiffs allege a violation of their alleged constitutional right to privacy and a violation of the First Amendment concerning the exercise of their religion.

The gravamen of the complaint is that male correctional officers, while performing their assigned tasks are able to observe plaintiffs while showering or going to the bathroom or performing other hygienic functions.

The male correction officers, hold positions or assignments in the housing units by virtue of having successfully bid for said positions or assignments pursuant to the collective bargaining agreement between the State and Council 82, which is the collective bargaining representative for correction officers. Said male correction officers are in all respects qualified to perform their assigned tasks as correction officers. At all times relevant to this action, they have performed their jobs lawfully and properly.

At Bedford, the women inmates are permitted to have the doors to their rooms closed for periods of up to "fifteen minutes at a time." The showers have curtains that obscure visibility from the corridor.

ARGUMENT

THE COURT MUST DENY THE MOTION
FOR PRELIMINARY INJUNCTION

It is the settled rule that the drastic relief of preliminary injunction should be sparingly granted, and only upon the clearest showing of likelihood of success on the merits and irreparable harm. This is particularly the case when, as here granting the preliminary injunction would give plaintiffs the fruits-of-victory that would be obtained after trial on the merits.

Plaintiffs make vague and conclusory allegations against unnamed unspecified correction officers. No dates times and places are provided, making it literally impossible to ascertain the truth of plaintiffs' allegations. Under the circumstances, relief must be denied. See ex. Huber Baking Co. v. Stroehmann, 208 F. 2d 464 (2d Cir. 1953).

It was plaintiffs' burden to demonstrate with specific competent evidence the nature and extent of the alleged violation of their rights. Plaintiffs have failed to do so.

At minimum, there are issues of fact raised which can only be resolved after a hearing to determine whether plaintiffs are entitled to relief. Relief must therefore be denied. See ex. Carter-Wallace Inc. v. Davis-Edward Pharmacal Corp. 443 F. 2d 867, 872 (2d Cir. 1971).

Further, plaintiffs have by the simple device of dressing behind a shower curtain or arranging to have the doors to their rooms closed, the means of securing the relief sought by

the instant action and motion. Inasmuch as plaintiffs can remedy the alleged problem by "self-help", injunctive relief would clearly be inappropriate.

Finally, granting the injunction will cause severe harm to the male correction officers who have a contractual right to be assigned to their present positions at Bedford Hills. These men have performed their tasks lawfully and properly. Granting the injunction will deprive them of valuable rights in employment solely because of their sex. If these employees behave improperly, they are subject to discipline by the Department. That to date they have not been, reveals the complete lack of merit of plaintiffs' case.

The court is urged to consider the larger implications of the relief sought. Granting the motion will necessarily result in the removal of female correction officers from assignments in male institutions solely because of their sex. It will disqualify employees from bidding for positions in futuro solely because of their sex.

Clearly, the harm to these correction officers by granting the motion outweighs the harm to plaintiffs by denial. The harm, if any, to plaintiffs is negligible, and can be cured by closing a shower curtain or door, which they are permitted to do. The harm to the correction employees however, is devastating, including but not limited to deprivation of valuable rights in public employment in violation of the contract, and applicable law.

CONCLUSION

THE MOTION FOR A PRELIMINARY
INJUNCTION MUST BE DENIED.

Respectfully submitted,

ROWLEY & FORREST P.C.
Attorneys for Defendants
Council 82, Gray, DeFayette,
Local 1265, and Yarell
90 State Street
Albany, New York 12207
(518) 434-6187

Of Counsel:

William A. Babiskin

-----x

OWEN, District Judge

—

60 ✓

Prior to oral argument, I read the affidavits and briefs submitted by the various parties. On June 9, at oral argument,⁽²⁾ and after determining that, for the purposes of a preliminary injunction motion, there were no issues of fact requiring a hearing and the standards for granting a preliminary injunction were clearly met,⁽³⁾ Sonesta Int'l Hotels Corp. v. Wellington Associates, 483 F.2d 247, 250 (2d Cir. 1973), I granted the preliminary injunction from the bench.

Pursuant to Rule 52(a), F.R.C.P., the following are my findings of fact and conclusions of law upon which the preliminary injunction was granted.

Plaintiffs submitted four affidavits from inmate-plaintiffs alleging inter alia:

"The men correction officers look over the curtains which we use to cover the doorways to our cells when we are on the toilet. They pull these curtains down for no good reason" (4)

(2) Attorney for the union defendants chose to submit his opposition to the motion, and did not appear at the argument.

(3) This memorandum deals with plaintiffs' likelihood of success on the merits. As to a balancing of hardships, plaintiffs are clearly irreparably injured each time their constitutional right to privacy is invaded. Defendants, on the other hand, do not face irreparable injury. No corrections officers will have to be fired; only the selection of work assignments are affected.

(4) Affidavit of Bernidienne Watkins sworn to on May 3, 1977. To the same effect are the other affidavits.

116a

"Men guards have come into the shower room while I am drying myself and watched as I dried and dressed myself." (5)

"It is also embarrassing that male guards are sent around to take the 6:30 a.m. count. I am usually asleep, and I feel very awkward about being awakened and peered at by these men guards when I am completely unable to control what position they observe me sleeping in." (6)

"Finally, I feel very awkward that men are assigned as C.O.'s at the hospital. One time (March 24, 1977), I went to the hospital and was describing to the nurse what my problem which was of a personal, female nature [sic]. There was a man guard directly in front of the medication window, where the nurse was. I was very embarrassed to have to describe the problem in front of the man guard." (7)

In their answering affidavits, none of these specific charges were denied. Defendant Carl F. Grey, Executive Director of the local Security Unit Employees union in his

(5)

Affidavit of Carol Crooks sworn to on May 3, 1977.

(6)

Affidavit of Yvonne Lee sworn to on May 3, 1977.

(7)

Id. For the purposes of this motion, I have not considered the allegations that the male guards do not announce themselves when they come into the housing unit corridors because on May 9, 1977, subsequent to the affidavits, a directive was issued by defendant Ward that absent an emergency situation "correction officers of the opposite sex shall announce their presence in housing areas"

affidavit sworn to on June 7, 1977 makes much of the fact that, apparently, no disciplinary action has been taken against any male corrections officers and no grievances have been filed "by plaintiffs pursuant to the inmate grievance procedure with respect to any particular male correction officer at Bedford Hills." The decision not to use the grievance system does not rebut plaintiffs' allegations.⁽⁸⁾ Plaintiffs did not sit on their rights. Male corrections officers were for the first time assigned to the housing units in February 1977. This complaint was filed on April 1.

Further, defendant Grey is incorrect when he states at ¶ 21 that "[p]laintiffs have presented allegations against unnamed individuals." The affidavit of Yvonne Lee and Linda Marron each name a specific Corrections Officer. None of the defendants submitted affidavits from these Correction Officers challenging the truth of the allegations, nor were affidavits submitted challenging generally the truth of plaintiffs' assertions. For the purposes of this motion, then, I take the allegations of the four affidavits as true.

(8)

There is no requirement under 42 U.S.C. § 1983 that plaintiffs exhaust administrative remedies such as an inmate grievance procedure.

118a

Instead of rebutting plaintiffs' allegations, defendants claim that the extraordinary relief of a preliminary injunction is not warranted because self-help remedies are available to the inmates. The State, by affidavit, asserts that in addition to the partial curtains covering the open / ^{doorway} of each cell, which the inmates claim are pushed aside or looked over, there are also solid doors to each cell with a small glass peephole, also coverable with a curtain. These solid doors, the State conceded on the argument, are locked open. They can be closed, on an individual basis, by a corrections officer when the inmate asks for it. Based on this, defendants point to the fact "that prison policy permits [the inmates] to request that their doors be closed and the curtains pulled over the windows for fifteen minutes at a time while they are attending to personal needs." (9)

However, it is not a satisfactory solution to the impairment to the fundamental right of privacy that an inmate must ask a corrections officer (who would often be a man) to come and close her door every time during every day she wished to use the toilet -- and what if

(9)

Affidavit of Margery Reifler, Assistant Attorney General, sworn to on June 8, 1977.

she took longer than fifteen minutes?

The State argues that an inmate can dry off and dress in the very stall in which she has showered to avoid male guards' eyes. But why should an inmate have to dry off and dress in a damp shower stall instead of an anteroom made for that purpose in order to preserve her basic human dignity?

Does an inmate have to be awakened or observed during sleep by a male guard, her night garments or bed clothes in possible disarray? Must she discuss personal, female problems with hospital staff when male corrections officers are in the room?

"[C]orrectional inmates are endowed with such constitutional rights as are consistent with inmate status Status as a correctional inmate entails an immediate loss of solitude. It does not necessarily destroy the other emotional stances and restrains forming the compound called privacy." In re Long, 127 Cal. Rpt. 732, 736-37 (Ct. App. 1976).

There can be little doubt that there is a constitutional right to privacy, which is fundamental and whose abridgment must be supported by a compelling state interest. Carey v. Population Services Int'l, 45 U.S.L.W. 4601 (U.S. June 9, 1977). Such a right

she took longer than fifteen minutes?

The State argues that an inmate can dry off and dress in the very stall in which she has showered to avoid male guards' eyes. But why should an inmate have to dry off and dress in a damp shower stall instead of an anteroom made for that purpose in order to preserve her basic human dignity?

Does an inmate have to be awakened or observed during sleep by a male guard, her night garments or bed clothes in possible disarray? Must she discuss personal, female problems with hospital staff when male corrections officers are in the room?

"[C]orrectional inmates are endowed with such constitutional rights as are consistent with inmate status Status as a correctional inmate entails an immediate loss of solitude. It does not necessarily destroy the other emotional stances and restraints forming the compound called privacy." In re Long, 127 Cal. Rpt. 732, 736-37 (Ct. App. 1976).

There can be little doubt that there is a constitutional right to privacy, which is fundamental and whose abridgment must be supported by a compelling state interest. Carey v. Population Services Int'l, 45 U.S.L.W. 4601 (U.S. June 9, 1977). Such a right

extends to prison inmates. In re Long.

"We cannot conceive of a more basic subject of privacy than the naked body. The desire to shield one's unclothed figured [sic] from view of strangers, and particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity." York v. Story, 324 F.2d 450, 455 (9th Cir. 1963).

A prisoner's right of privacy must obviously be circumscribed due to needs of prison security and order. However, these legitimate, compelling state interests are not present here. Male corrections officers were assigned to the housing and hospital units at Bedford Hills in response to a conception by the prison administration and the union of the requirements of Title VII of the 1964 Civil Rights Act, as amended in 1972. The strictures of Title VII, however, do not mandate providing opportunity to possible "Peeping Toms." Because of a prison's need for "unceasing staff surveillance . . . [which] belies the feasibility of supplying wards with places of concealment," In re Long, 127 Cal. Rpt. at 737, even the most considerate male guard cannot help but invade an inmate's privacy.

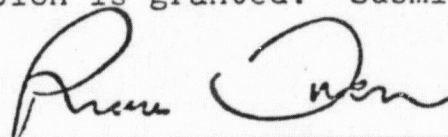
122a

"When undressing in the bedrooms, when bathing, urinating or defecating, the wards must be either visible to the observer, partly visible or available for visibility. When the observer is a [male], an invasion of privacy occurs which is not justified by institutional needs." Id.

The "tension between the individual's right to employment without regard to his or her sex and the inmates' right to privacy can be resolved by selective work responsibilities among correctional officers" Meith v. Dothard, 418 F. Supp. 1169, 1185 (M.D.Ala.1976), appeal argued, 45 U.S.L.W. 3705 (U.S. April 19, 1977). (10)

The preliminary injunction is granted. Submit order.

June 17, 1977.



United States District Judge

(10)

See also Wise v. Reynolds, 375 F. Supp. 145, 151 (N.D. Tex. 1973) (female guards in a male prison).

"Selective work responsibilities among correctional officers excluding from the duties of women assignment to dormitories or shake-downs is reasonable to insure privacy of inmates and does not discriminate against women."

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X	
IOLA FORTS, et al.,	:
Plaintiffs,	: 77 Civ. 1560
-against-	: ORDER WITH NOTICE
BENJAMIN WARD, et al.,	: <u>OF SETTLEMENT</u>
Defendants.	:
-----X	

Plaintiffs having moved the Court for an order:

1) pursuant to F.R.C.P. § 65, preliminarily enjoining defendants from assigning men correction officers to housing units at Bedford Hills Correctional Facility, and 2) pursuant to F.R.C.P. § 23(c)(1), certifying the Class; and the Court having read the briefs and affidavits submitted by all parties, and having heard argument by Stephen M. Latimer, Esq., attorney for plaintiffs in support of the motion, and Leonard J. Pugatch, Esq., Asst. Attorney General, for defendants Ward, Clement and Reid in opposition, and upon the decision of the Court dated June 17, 1977 with findings of fact and conclusions of law contained therein; and it further appearing that no security is required as a condition of an injunction; and it further appearing that the relief

ordered below will automatically insure to the purported Class;

NOW, on motion of Bronx Legal Services, Corporation C., attorneys for plaintiffs, it is ordered that:

1) Plaintiff's motion to certify the Class is denied without prejudice to renewal on an appropriate showing;

2) Plaintiff's motion for a preliminary injunction is granted;

3) Pending a final determination of the action, defendants Ward, Clement, Reid and every person specified in F.R.C.P. § 65(d), are enjoined from assigning men correction officers at Bedford Hills Correctional Facility to housing units at that institution, and to remove those presently assigned. For purposes of this order "housing unit" means those portions of Building 111, 112, 113, 114 and the hospital which contain cells or rooms in which inmates live, or which contain toilets or shower facilities.

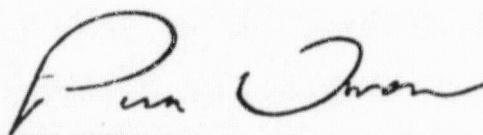
Defendants Clement and Reid shall, within ten days of the date of this order, make the necessary job and shift assignments to comply with this paragraph.

4) Pending a final determination of the action, defendants Ward, Clement and Reid and any person specified

in F.R.C.P. § 65(d), are hereafter enjoined from permitting or requiring men correction officers who are assigned to any part of the prison, to look in or enter shower or toilet facilities used by women inmates, except under emergency circumstances.

5) Defendants' application for a stay pending appeal is denied.

Dated: New York, N.Y.
June 22, 1977.



United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IOLA FORTE, et al.,

Plaintiffs,

-against-

BENJAMIN WARD, et al.,

Defendants.

NOTICE OF APPEAL

77 Civ. 560 (R.O.)

C I R C :

PLEASE TAKE NOTICE that defendants Ward, Clement, and Bell appeal to the United States Court of Appeals for the Second Circuit from paragraphs two, three, and four of the order of this Court (Quinn J.) dated June 22, 1977, which granted plaintiffs' motion for a preliminary injunction.

Dated: New York, New York
June 27, 1977

Yours, etc.

LOUIS J. LUKOMSKI
Attorney General of the
State of New York
Attorney for Defendants
Ward, Clement, & Bell
Office & P.O. Address
Two World Trade Center
New York, New York 10047
By

MER
JACQUELYNNE B. WATKINS
Assistant Attorney General
Tel. (212) 408-7599/2335

TO: STEPHEN M. LATIMER, ESQ.
Attorney for Plaintiffs
Bronx Legal Services Corp. C
579 Courtlandt Avenue
Bronx, New York 10461

WILLIAM A. FARISHTIN, ESQ.
Attorney for Defendants
Security Unit Employees
Council 32, Gray, DuRoi
Local 1265, and Varrell
Bowley and Forrest, P.C.
99 State Street
Albany, New York 12207

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

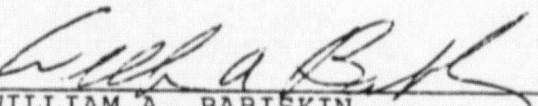
IOLA FORTS, et al,	:	
	:	
- against -	:	Plaintiffs,
	:	NOTICE OF APPEAL
BENJAMIN WARD, et al,	:	77 Civ. 1560
	:	Judge Owen
	:	
	:	Defendants.
	:	

PLEASE TAKE NOTICE that defendants Security Unit Employees Council 82, Gray, DeFayette, Local 1265, and Yarell hereby appeal to the United States Court of Appeals for the Second Circuit from each and every part of paragraphs "2", "3", "4", and "5" of the order of Hon. Richard Owen, District Judge, dated June 22, 1977 which granted plaintiffs' motion for a preliminary injunction.

DATED: Albany, New York
June 28, 1977

Yours, etc.,

ROWLEY AND FORREST P.C.
Attorneys for Defendants Security
Unit Employees Council 82, Gray,
DeFayette, Local 1265, and Yarell
Office and P.O. Address
90 State Street
Albany, New York 12207
Telephone: (518) 434-6187

By 
WILLIAM A. BABISKIN

128a

TO: STEPHEN LATIMER, ESQ.
Attorney for Plaintiffs
Bronx Legal Services Corp.
579 Courtlandt Avenue
Bronx, New York 10451

MARGERY EVANS REIFLER, ESQ.
Assistant Attorney General
Attorneys for Defendants Ward,
Clement & Reid
Two World Trade Center
New York, New York 10047

